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No._____

In The Supreme Court of the United States

OCTOBER TERM 1980

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., *Petitioner*

v.

HYDROLEVEL CORPORATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HAROLD R. TYLER, JR.
Attorney for The American Society of Mechanical Engineers, Inc.
30 Rockefeller Plaza
New York, New York 10112
(212) 541-4000

Of Counsel:
RICHARD D. PARSONS
FREDERICK T. DAVIS
STEVEN C. CHAREN
PATTERSON, BELKNAP, WEBB & TYLER
30 Rockefeller Plaza
New York, New York 10112

QUESTIONS PRESENTED

1. Whether a non-profit, voluntary membership organization may be found liable for "unintentional participation" in a conspiracy to restrain trade and to monopolize, in violation of Sections 1 and 2 of the Sherman Act, on a theory of negligence.

2. Whether a non-profit, voluntary membership organization is strictly liable under the antitrust laws for all acts of its volunteer members within the scope of their "apparent authority," when (a) the acts were neither authorized nor ratified by the organization, (b) the members did not intend to, and did not in fact, benefit the organization by their actions, and (c) the members actively deceived the organization for their own purposes and benefit.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner American Society of Mechanical Engineers ("ASME") respectfully requests that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit entered on November 24, 1980.

OPINION BELOW

The opinion of the Court of Appeals is reported at 635 F.2d 118 (2d Cir. 1980). It also appears in the Appendix hereto at A-1 to A-26.* The District Court filed no opinions on issues raised in this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on November 24, 1980. On December 8, 1980, Respondent Hydrolevel Corporation ("Hydrolevel") filed a motion to extend the time in which to file a petition for rehearing to December 15, 1980; this motion was granted and made applicable to both parties. A timely petition for rehearing, and suggestion of rehearing *en banc*, was filed by ASME on December 15, 1980. The petition and suggestion were denied on January 22, 1981. A-27. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This suit involved application of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. These provisions appear at A-28.

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* Citations to the Appendix to this petition are in the above form. The Joint Appendix in the Court of Appeals is cited as "J.A.". ASME's Exhibit Volume in the Court of Appeals is cited as "AX V.". Plaintiff's and defendant's exhibits in the District Court are cited as "PX" and "DX," respectively.

STATEMENT OF THE CASE

A. Synopsis

ASME is a non-profit technical and scientific society founded in 1880 for the purpose of enhancing the use of mechanical engineering in the public interest.* It has more than 100,000 individual members, drawn from a broad spectrum of American life, including industry, academia, government, insurers and consumer groups. It conducts educational and research programs, publishes a national magazine and a number of research journals devoted to mechanical engineering and, of particular importance to this case, promulgates and renders interpretations with respect to over 400 codes and standards designed to improve public safety and promote standardization. These codes and standards are "voluntary" in that they do not have the force of law. However, they have been incorporated by reference into many federal, state and local laws, regulations and ordinances.

This case focused on the improper issuance and subsequent misuse of a single letter written by a volunteer member of ASME interpreting an ASME standard of performance for low-water fuel cut-offs, a safety device included in steam and hot water boilers. The facts at trial showed, and the Court of Appeals assumed for purposes of its decision, that in writing the letter the drafter acted disloyally to ASME, intending through the letter to benefit a third party without the knowledge or intentional participation of ASME. Hydrolevel, a manufacturer of one such cut-off device, contended that the letter was the result of an antitrust conspiracy with one of Hydrolevel's competitors, pursuant to which Hydrolevel was damaged and eventually forced out of business. The Court of Appeals held, in essence, that ASME was liable under the federal antitrust laws for damages caused by the alleged conspiracy even though its participation therein was "unintentional." It further held that ASME was strictly

* Contrary to the view apparently embraced by the Court of Appeals, ASME is not a trade association and it has no corporate members. It is a scientific membership corporation exempted from federal taxation under Section 501(c)(3) of the Internal Revenue Code.

liable for the acts of its members within the scope of their "apparent authority," even though they did not, and logically could not, intend to benefit ASME, but rather actively deceived it to further their own ends. The panel thus allowed the finding of liability to stand, although remanding for a new trial on damages.

B. The Facts

1. Background

As noted above, ASME promulgates and renders interpretations with respect to more than 400 codes and standards. Over 10,000 ASME volunteer members participate in the many ASME committees and subcommittees that draft, revise and interpret these codes and standards. A-3; 635 F.2d at 121. One of the oldest ASME codes is the Boiler and Pressure Vessel Code (the "B-PV Code"), which sets standards of construction and performance for various components of steam and hot water boilers and other pressure vessels. The B-PV Code was first promulgated in the early part of the twentieth century when boiler explosions caused by poor design or fabrication or by inadequate safety precautions frequently caused death, injury and property damage. (J.A. 928-29). Section IV of the B-PV Code, which deals specifically with heating boilers, has been adopted in 46 states and all Canadian provinces. (PX 30A at Exh. H, pp. 2-3). Since the promulgation and acceptance of the B-PV Code, boiler explosions have been virtually eliminated. (J.A. 929).

As a public service, ASME provides free of charge to members and non-members alike written and oral interpretations of its codes. Under the procedures set forth in its by-laws, requests for interpretation are referred to the ASME committee responsible for the code in question. The committee, following its own internal procedures, may respond to properly worded inquiries in writing. ASME regularly receives approximately 20-30,000 such inquiries per year regarding the B-PV Code alone. (J.A. 861). The Boiler and Pressure Vessel Committee ("the B-PV Committee") supervises and interprets the B-PV Code and, in turn,

maintains the Section IV Subcommittee responsible for that section.

In answering questions concerning an interpretation of a code, neither ASME nor its committees approve, recommend or endorse proprietary or specific designs. Rather, ASME simply states abstract standards of construction or performance—that is, principles of acceptable levels of safe operation. Letters of inquiry which can only be answered by addressing the acceptability of a particular device or design are not answered by ASME. (AX V. 191; J.A. 732-33).

2. Hydrolevel and the Low-Water Fuel Cut-Off

Boilers generally include a device that automatically cuts off the fuel supply—and thus shuts down the boiler—before the water in the boiler falls to a dangerously low level. If a cut-off device fails to operate, it may result in "dry firing"—that is, operation of the boiler without a sufficient supply of water to moderate temperature. Dry firing can easily result in an explosion causing injury to persons or property. (J.A. 169, 928).

Traditionally, fuel cut-offs have operated on a "float" principle. If the water in a boiler drops below a critical level, the float falls, tripping a switch which cuts off the fuel supply. For many years, McDonnell and Miller, Inc. ("M&M") manufactured a float-type cut-off device, and accounted for 70-85% of all American sales. In 1965, Hydrolevel began manufacturing an electrically activated cut-off of the so-called "probe" variety. With a probe cut-off, when water in the vessel is maintained at a certain level, water covers an electrode, thus completing a circuit activating the fuel supply. If the water level falls below the electrode, the circuit is broken and the fuel supply is terminated. One difficulty with the probe cut-off is that, when used in a steam boiler, bubbling or surging of the boiling water may intermittently activate the cut-off and cause rapid fluctuations in the fuel supply. For this reason, certain Hydrolevel models for residential steam boilers incorporated a "time-delay" element to prevent temporary fluctuations in water level from cutting off the fuel supply. (J.A. 161-62; DX BN, pp. HT1268-9).

3. The April 29, 1971 Letter

In March 1971, James Solon, President of M&M; Eugene Mitchell and John James, Vice-Presidents of M&M; and T. R. Hardin, an Executive Vice-President of Hartford Steam Boiler Inspection and Insurance Company ("Hartford"), met over dinner in Chicago. At that time, James and Hardin were also active as ASME volunteers, Hardin as Chairman and James as Vice-Chairman of the Section IV Subcommittee. Among other matters, those present at the Chicago dinner discussed the possibility of requesting from ASME advice on whether a low-water fuel cut-off could meet ASME standards if it included a time-delay. (PX 16a, pp. 787-92; PX 18A, pp. 382-88; PX 14, p. 133). James and Hardin thereafter consulted about the wording of the request. (PX 16a, pp. 877, *et seq.*).

On April 12, 1971, Mitchell of M&M directed a letter, drafted by James, to W. B. Hoyt, staff Secretary of the B-PV Committee. This letter requested an interpretation of ¶ HG-605 of the B-PV Code. The B-PV Code requires that a glass gauge be placed on heating boilers so that one can visually determine the amount of water in the boiler. (AX V. 8-9 (¶ HG-602(b))). Paragraph HG-605(a), in turn, requires that a cut-off be located so as to cut off the fuel supply automatically when the surface of the water falls to the lowest visible part of the gauge glass. (AX V. 2 (¶ HG-605(a))).

The April 12, 1971 letter (AX V. 1) inquired whether ¶ HG-605 permitted the incorporation of a time-delay feature in a cut-off if it would operate only "after the boiler water level reaches some point below the visible range of the gauge glass?" Following standard Committee procedures, Hoyt, who had no expertise in this aspect of heating boilers, referred the letter to Hardin, as Chairman of the appropriate Subcommittee. (J.A. 864-65, 903-04). Still following ASME procedures, Hardin composed a draft reply, which he sent to Hoyt, as well as to the Chairman and Vice-Chairman of the B-PV Committee. (AX V. 6-7).

On April 29, 1971, Hoyt responded to the M&M inquiry by forwarding the "advice" of the Subcommittee Chairman,

adopting Hardin's language as an "unofficial communication." A-7; 635 F.2d at 122. In essence, the reply (AX V. 10) stated that "it is the intent of Par. HG 605(a) that the low-water fuel cut-off operate immediately and positively when the water boiler level falls to the lowest visible part of the water gauge glass," and that a time delay feature which operated after the water had left the gauge glass would provide "no positive assurance that the boiler water level would not fall to a dangerous point during the time delay."

4. Misuse of the April 29, 1971 Letter by M&M

Notwithstanding the extremely limited nature of the April 29 letter, officials of M&M proceeded to misuse it in promotional efforts, linking the "advice" of the "unofficial communication" to Hydrolevel's specific device. M&M included in a booklet for its salesmen called "The Opposition—Who They Are, How to Beat Them" an erroneous statement that "a time delay of any kind in the firing device circuitry would very definitely be against the ASME Code . . . ." (AX V. 11-20). In addition, M&M officials made similar statements to potential customers to persuade them not to buy the Hydrolevel device. (See, *e.g.*, PX 13, pp. 139-43). There was, however, absolutely no evidence that ASME participated in this activity or was even aware of the misuse of its letter until Hydrolevel brought the matter to its attention in early 1972.

In January 1972, a vice-president of Hydrolevel learned that potential customers had been told about ASME's April 29 letter, as misrepresented by M&M. (J.A. 186-87). He wrote to Hoyt of ASME, asking for a copy of the letter. (AX V. 21). On February 8, 1972, ASME responded, quoting in full the substantive provisions of the April 29 letter. (AX V. 22). Thereafter, on March 23, 1972 the president of Hydrolevel directed a lengthy complaint to Mr. Hoyt and all B-PV Committee and Section IV Subcommittee members (AX V. 29-37), requesting that ASME issue a "correcting statement."

5. ASME's June 9, 1972 Letter

Upon receipt of Hydrolevel's complaint, ASME placed the matter on the agenda for the next meeting of the Section

IV Subcommittee and the B-PV Committee. Hydrolevel was informed of these meetings but, despite the fact that all ASME meetings are open to the public and that even non-members have an opportunity to participate in debate, it did not send a representative.

After public discussion in both the Subcommittee and the B-PV Committee, the B-PV Committee drafted a letter specifically informing Hydrolevel that "there is no intent in Section IV to prohibit the use of low water fuel cut-offs having time delays . . . ." Thereafter, the draft was circulated with the minutes of the Committee meeting to over 300 individuals active in the boiler market (J.A. 673, 837), and was issued in final form on June 9, 1972 (AX V. 77). Hydrolevel distributed the June 9 letter to customers and potential customers. (J.A. 294; AX V. 78-79).

Although Hydrolevel could have appealed the June 9, 1972 response to ASME's Policy Board on Codes and Standards had it been dissatisfied with either its contents or the procedures leading to its issuance (App. 818-19), it did not do so. On August 19, 1975, Hydrolevel filed this suit.*

C. The Complaint, The Trial, and The Court of Appeals' Opinion

1. *The Complaint.* Although the amended complaint against ASME originally contained several counts based on state law charges, those counts were voluntarily withdrawn. The remaining count charged that ASME conspired with M&M and Hartford to restrain trade in violation of Section 1 of the Sherman Act and to monopolize the low-water cut-off market in violation of Section 2. (J.A. 62-65). Hydrolevel's apparent theory was that through issuance and misuse of the April 29, 1971 letter, ASME conspired with M&M and

* Named along with ASME as defendants were the International Telephone and Telegraph Corporation and Hartford; ITT had purchased M&M in December 1971, and, according to Hydrolevel, Hartford had participated in the conspiracy through the acts of Hardin. Prior to trial, ITT and Hartford settled the charges against them for $725,000 and $75,000, respectively, and an amended complaint was filed naming ASME as the sole defendant.

Hartford to eliminate Hydrolevel as a potential force in the cut-off market.

2. *The Trial.* During the presentation of its case, Hydrolevel proceeded on the theory that James and Hardin devised a "loaded" question to be posed to ASME, and orchestrated an intentionally misleading response by ASME in the form of the April 29, 1971 letter. Hydrolevel's premise was that ASME participated in and was liable for these acts. At the close of the plaintiff's case, the trial judge expressly rejected this theory, ruling that there was insufficient evidence to show that ASME had knowledge of or was liable for the issuance of the April 29 letter.* Instead, the Court allowed the case to continue solely on a new and hitherto unexpressed theory that ASME might be liable for M&M's activities because it failed to take more effective steps when it first learned of them in 1972.**

3. *The Court of Appeals' Opinion.* On appeal to the United States Court of Appeals for the Second Circuit, the parties focused on two theories. First, ASME argued that there was no evidence that it intentionally or deliberately participated in a conspiracy to restrain trade or to monopolize; Hydrolevel, on the other hand, contended that ASME's handling of the April 29, 1971 letter showed that it was an active and knowing

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* "If all you had was the original issue of the letter, and even a conference, I don't think I would let it go to the jury. After all, you can't have an organization like this held responsible when some businessman wants to use or abuse his position, given the best possible posture to the plaintiff's case. So even though M&M wanted to use your client [ASME] as a vehicle for getting some advantage, I don't think that is enough to hold you liable." (J.A. 593-94).

** ". . . But once having had the matter brought to its attention and having made clear to permanent employees of rather high rank that a possible injustice has been done it might be thought by the trade to indicate disapproval. It does not seem to me that it can be argued that the failure at that point to take reasonable steps . . . to clarify the situation to the trade, it could be considered as an implicit joining of a conspiracy already entered into." (J.A. 594).

participant. Second, Hydrolevel argued—and ASME disputed—that ASME's reaction to the discovery of the circumstances surrounding the April 29, 1971 letter constituted a "ratification" of the conspiratorial acts. The first theory had been rejected by the trial judge at the close of the plaintiff's case, while the second theory reflected the basis on which the judge allowed the case to go to the jury. Under either theory, ASME argued that under normal principles of agency law, it could not be held liable for the acts of disloyal volunteer members unless those members intended through their acts to benefit ASME.

In its opinion, the panel of the Court of Appeals did not reach either theory of liability; although, in its damages section, it implicitly rejected Hydrolevel's "ratification" argument by holding that ASME had cured any adverse effect of the April 29, 1971 letter by publishing a full and fair correction of it on June 9, 1972. A-22 to A-23; 635 F.2d at 129. Rather, the Court noted: "We need not resolve that dispute [between the two theories], for we hold that the district court erred in refusing Hydrolevel's requested jury instruction that incorporated an apparent authority theory." A-13; 635 F.2d at 125.

The panel acknowledged that "the appropriate theory for conventional torts" (A-13; 635 F.2d at 125) is that a corporation is liable for the acts of its agent only if the agent intended to advance his employer's interest. It then decided that vicarious liability in federal antitrust cases should not be governed by this general rule, but rather that antitrust defendants should be liable for acts of their agents even when the agents acted solely for their own purposes and actively deceived the principal. It concluded, "The conduct at issue here, however, is far closer to the torts discussed in [*Restatement (Second) of Agency*] § 247 (defamation); § 248 (interference with business relations); § 257 (misrepresentation); and §§ 261 and 262 (fraud). None of these sections ties the principal's liability to a requirement that the agent act at least in part for the principal's benefit, and several expressly reject such a requirement." A-13; 635 F.2d at 125. The Court reasoned that a conspiracy to restrain trade is so

similar to fraud, injurious falsehood, and defamation that application of the *Restatement* rules governing those torts is appropriate.

The Court of Appeals thus held that in federal antitrust cases the standard for vicarious liability should be the broadest that appears in agency law, and that a principal is liable for all acts of its agents within the scope of their "apparent authority." The Court reached this conclusion even though it acknowledged that the organization had no knowledge of the agents' real motives, the agents did not intend to benefit the organization, and the agents actively deceived the organization in order to benefit themselves and their true principals (in this case, their employers, M&M and Hartford). Finally, the panel emphasized that ASME's participation in the antitrust conspiracy was "unintentional" (A-26; 635 F.2d at 131), and suggested that its decision was based on a theory of negligence. The panel noted that "[w]hile ASME may have no alternative to staffing its committees with business people having practical knowledge, there is a corresponding duty to be aware of and guard against the temptations thus afforded by inherent conflicts of interest. Absent some internal review procedures, no individual should be empowered to rule dispositively on the fitness of a competitor's product." A-16; 635 F.2d at 126.

REASONS FOR GRANTING THE WRIT

Review by this Court of the decision of the Court of Appeals is necessary to resolve an issue of national significance concerning the liability of non-profit, voluntary associations for improper and unauthorized acts of their volunteer members.

The core of the Court of Appeals' decision was its determination that the general rule of agency liability was inapplicable in antitrust cases and that in this area vicarious liability should be governed by the exceptional rule of "apparent authority."

As this petition will demonstrate, the panel's decision squarely conflicts with controlling decisions of this Court and

with decisions in other Courts of Appeal. In addition, the decision establishes a revolutionary new standard for vicarious liability under the federal antitrust laws that is wrong as a matter of sound antitrust policy and will adversely affect a broad range of quasi-public, non-profit organizations performing vital functions in the public interest. For these reasons, the Court should grant the petition for a writ of certiorari.

I. The Application of an "Apparent Authority" Standard for Agency Liability, and Liability for Negligent, "Unintentional Participation" in an Antitrust Conspiracy, are Contrary to the Decisions of this Court.

This Court has held on numerous occasions that an antitrust conspiracy, whether under Section 1 or Section 2 of the Sherman Act, requires an intentional, purposeful agreement.

> "Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified."

American Tobacco Co. v. *United States,* 328 U.S. 781, 810 (1946); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211, 213 (1951) (requirement that conspirators have "a unity of purpose or a common design and understanding"); see also *United States* v. *General Motors,* 384 U.S. 127, 143 (1966) ("joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan"). These decisions reflect the inherent nature of a conspiracy: one cannot be held liable for the acts of others unless one intends to act jointly with them and has knowledge of at least some of the illicit purposes of the joint venture. See generally, *United States* v. *United States Gypsum Co.,* 438 U.S. 422, 443 n.20 (1978).

In this case, the panel never addressed the question of whether ASME had knowledge of the acts of James, Hardin and M&M or intended to participate in them. It reasoned that, since Hardin and James conspired to aid M&M in its

efforts to disparage Hydrolevel's product and since they acted within the scope of their "apparent authority" from ASME, ASME was liable as a participant in an antitrust conspiracy to restrain trade in violation of Section 1 of the Sherman Act.* The panel expressly rejected any requirement that plaintiff had to demonstrate that Hardin and James intended even in part to benefit ASME or that ASME ratified their acts before they could be attributed to ASME. Indeed, the panel assumed for purposes of its holding that Hardin and James did not intend to benefit ASME, that they concealed their true motives from ASME and that ASME did not ratify their acts when it finally learned of them.

This Court has expressly ruled that "apparent authority" of an agent is an insufficient predicate for a principal's liability under the federal antitrust laws. In *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U.S. 344 (1922), a labor union was sued under the Sherman Act for concerted activity having an anticompetitive effect on plaintiff's business. Addressing the question "whether the International Union was shown by any substantial evidence to have initiated, participated in or ratified the interference with plaintiffs' business," *id.* at 393, this Court reversed a verdict in the plaintiff's favor, holding that under agency principles applicable to the antitrust laws, a voluntary organization could not be held liable for the acts of its members absent either actual authority or ratification:

> "A corporation is responsible for the wrongs committed by its agents in the course of its business, and this principle is enforced against the contention that torts are ultra vires of the corporation. But it must be shown that it is in the business of the corporation. Surely no stricter rule can be enforced against an unincorporated organization like this. Here it is not a question of contract or of

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* The Court of Appeals completely avoided discussion of the requirements of a monopolization charge under Section 2 by overlooking it: although the complaint, summations, charge and judgment all emphasized that Hydrolevel proceeded on a theory that ASME was liable under both Section 1 and Section 2, the opinion refers only to a "conspiracy to restrain trade in violation of Section 1." A-2; 635 F.2d at 120.

> holding out an appearance of authority on which some third person acts. It is a mere question of actual agency which the constitutions of the two bodies settle conclusively. If the International body had interfered or if it had assumed liability by ratification, different questions would have arisen."

Id. at 395. In *Coronado Coal Co.* v. *United Mine Workers of America*, 268 U.S. 295 (1925), the case again came before this Court after retrial, during which the plaintiff had introduced evidence showing that the president of the union had directly encouraged the acts complained of. This Court held that, while such evidence might have sufficed to impose personal responsibility on the labor officials involved, it was insufficient to impose liability on the union. The Court held that "it must be clearly shown in order to impose such a liability on an association of 450,000 men that what was done was done by their agents in accordance with their fundamental agreement of association." *Id.* at 304.

In the instant case, the panel dealt with the *Coronado Coal* decisions first by misstating their applicability to ASME's argument, and then by proposing an artificial ground for "distinguishing" them. Instead of discussing *Coronado Coal* in terms of agency liability, the panel phrased ASME's argument as being that "ASME's unique structure or status should mandate a different result." A-18; 635 F.2d at 127. In fact, while *Coronado Coal* implied that a voluntary association should be protected by at least as strict a test as that governing business organizations, it squarely held that in *any* case actual authority or ratification, rather than apparent authority, was necessary.

The panel then reasoned that *Coronado Coal* merely "held that an international union may not be held liable for a Sherman Act violation by leaders of a local where, under the constitution of the International, it could only accept authority for the action by express ratification. 268 U.S. at 304." A-18; 635 F.2d at 127. This limitation of *Coronado Coal* to instances where an organization "accepts" authority for its members' action makes no sense and is rejected by precedent.

While an entity's internal organization undoubtedly has bearing on its liability for the acts of its members, allowing an organization to "accept" or decline liability as a matter of choice is hardly sound policy and exalts form over substance, and the only other court to address this claimed distinction has so held. In *Truck Drivers' Local No. 421* v. *United States*, 128 F.2d 227 (8th Cir. 1942), the Court reversed a verdict in an antitrust prosecution on the ground that a voluntary organization was not liable for the acts of its members absent actual authority:

> "To bind the union in a situation such as this, actual and authorized agency was necessary; mere apparent agency would not be sufficient to take the matter to the jury, unless the circumstances were so strong as competently to support an inference of actual authority."

Id. at 235. In particular, the Eighth Circuit rejected an argument based on the distinction adopted by the panel in this case, namely, that *Coronado Coal* protected only an international with limited constitutional powers rather than a local, noting that "the difference fundamentally is primarily one of degree." *Id.* at 236.

In short, *Coronado Coal* squarely stands for the proposition that antitrust liability of a voluntary organization can be based on the acts of its members only if the members have actual authority to commit the illicit acts or if the organization ratifies those acts.* In veering so sharply from this precedent, the Court of Appeals committed error that should be reviewed by this Court.

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* Rather than following *Coronado Coal*, the panel purported to follow *Gleason* v. *Seaboard Air Line Railway Co.*, 278 U.S. 349 (1929), as holding that an organization is liable for unauthorized, disloyal acts of employees. A-13 to A-14; 635 F.2d at 125. *Gleason* involved a state law suit for liability on a bill of lading. It did not discuss or involve antitrust law and has never been followed in any antitrust case. As one commentator noted, its holding is "perhaps best explained" on the ground that the principal's involvement "in commerce makes it fair to impose liability on the carrier." Seavey, *Agency* § 92, p. 164 at n. 57 (1964).

The panel's opinion is also inconsistent with this Court's decisions requiring intentional participation in an antitrust conspiracy. *Coronado Coal* not only provides the standard for holding a principal liable for the acts of its agents, but it also establishes a rational basis for imputing to the principal the conspiratorial knowledge and intent that this Court has repeatedly recognized as an essential element of an antitrust conspiracy. See p. 11, *supra*. The panel's "apparent authority" theory provides no such basis; indeed, the panel candidly conceded as much, finding ASME liable for "unintentional participation" in the conspiracy. A-26; 635 F.2d at 131. Thus, the panel did not find that ASME knew of the illicit acts or intended to participate in them; rather, it based ASME's liability on a theory of negligence, holding that since ASME failed to supervise the acts of its volunteer members, it was strictly liable for their anticompetitive acts. See p. 10, *supra*.

This Court has never allowed a finding of antitrust liability to be based upon a negligence theory. Indeed, liability on the basis of negligence is squarely inconsistent with a requirement of intentional, knowing participation in a conspiracy. Thus, the panel's decision not only squarely conflicts with this Court's decision in *Coronado Coal*, but undermines the requirement of intentional participation in an antitrust conspiracy.

II. The Panel's Decision Allowing Vicarious Antitrust Liability on the Basis of "Apparent Authority" Conflicts With Every Decision on this Question In Other Circuits.

In holding that "apparent authority" was a sufficient basis for vicarious liability under the antitrust laws, and that an intent to benefit the principal was unnecessary, the panel did not discuss or rely on a single antitrust decision. In fact, every federal court that has ruled on the matter has held that, absent ratification by the principal, an antitrust plaintiff bears the burden of showing that an agent intended at least in part to benefit his principal in order for the principal to be liable.

No federal court, other than the panel in this case, has ever held that a principal is liable under the antitrust laws for acts of agents based on an "apparent authority" theory. The federal courts have likewise unanimously rejected an "apparent authority" theory as inapplicable to determinations of liability under federal regulatory statutes. Since vicarious liability under the antitrust laws should be judged under at least as strict a standard as liability under statutes requiring simple rather than treble damages, both the specific holding of the panel's opinion and its underlying rationale squarely conflict with decisions in the other federal courts.

As already discussed, in *Truck Drivers' Local No. 421* v. *United States, supra,* 128 F.2d 227, the Eighth Circuit held that in an antitrust case "mere apparent authority would not be sufficient to take the matter to the jury," *id.* at 235, holding, under *Coronado Coal,* that actual authority or ratification was necessary.

The Ninth Circuit, in an antitrust case brought under Section 1 of the Sherman Act, has also addressed the circumstances under which a corporation is liable for its agents' acts. In *United States* v. *Hilton Hotels Corp.,* 467 F.2d 1000 (9th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973), the Court held that a corporation may be liable even if it did not actually receive the benefit of the agent's acts. The Ninth Circuit squarely held, however, that the corporation would not be liable if the agent intended to benefit only himself or another, since "[a] purpose to benefit the corporation is necessary to bring the agent's acts within the scope of his employment." *Id.* at 1006, n. 4.

Similarly, in *United States* v. *American Radiator & Standard Sanitary Corp.,* 433 F.2d 174 (3rd Cir. 1970), *cert. denied,* 401 U.S. 948 (1971), the Third Circuit upheld corporate liability under the federal antitrust laws for the acts of an employee on the ground that the agent was "motivated at least in part by a desire to serve" the principal. *Id.* at 204.*

* Likewise, in *Arthur* v. *Kraft-Phoenix Cheese Corp.,* 26 F. Supp. 824 (D. Md. 1937), the Court dismissed a federal antitrust complaint on the

As the panel in this case acknowledged, the principle inherent in these cases—that an organization may be liable for the acts of its agents only if the agent intends thereby to benefit the corporation—is the general agency rule for tort liability. A-13; 635 F.2d at 125. For example, the *Restatement (Second) of Agency* provides generally that "[a]n act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed." *Id.*, section 235. Similarly, a principal is not deemed to have knowledge of events based solely upon the knowledge of an agent if "the agent secretly is acting adversely to the principal and entirely for his own or another's purposes. . . ." *Id.*, section 282(1).

These settled principles of agency liability have been repeatedly relied upon in many contexts in addition to antitrust cases, including suits under federal regulatory statutes. The many federal courts utilizing these agency principles have expressly rejected the panel's notion of "apparent authority" as a basis for liability and the panel's reasoning is squarely in conflict with these cases. For example, in *Schoenbaum* v. *Firstbrook*, 405 F.2d 200 (2d Cir. 1968), *cert. denied sub. nom. Manley* v. *Schoenbaum*, 395 U.S. 906 (1969), where the plaintiff brought a fraud action under the federal securities acts, the Court noted,

> "[A]s in other situations governed by agency principles, knowlege of the corporation's officers and agents is not imputed to it when there is a conflict between the interests of the officers and agents and the interests of the corporate principal."

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ground that the complaint was filed against a corporation rather than its agents:

> "If they [the defendant's agents] had improper personal motives and combined to carry them out through the medium of the defendant corporation to the prejudice of the plaintiff, it is conceivable that a common law tort suit might lie against them; but it is difficult to see how that would constitute either restraint of trade or monopoly of trade on the part of the defendant corporation."

Id. at 830.

Id. at 211.

Similarly, in *Standard Oil Co. of Texas* v. *United States*, 307 F.2d 120 (5th Cir. 1962), a prosecution under the federal Hot Oil Act, the Fifth Circuit rejected a finding of liability for an agent's acts since:

> "the purpose to benefit the corporation is decisive in terms of equating the agent's action with that of the corporation. For it is an elementary principle of agency that 'an act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed.' Restatement of the Law of Agency (2d) § 235."

Id. at 128 (footnote omitted). See also, *Moscarelli* v. *Stamm*, 288 F. Supp. 453, 461 (E.D.N.Y. 1968) (securities case; "It is axiomatic that conduct of an employee not for the purpose of serving the master is not within the scope of his employment (Restatement (Second), Agency, § 235 (1958). . . ."); *Slade* v. *Shearson, Hammill & Co., Inc.*, 79 F.R.D. 309, 313 (S.D.N.Y. 1978) (fraud suit under Securities Exchange Act of 1934; corporation may raise defense "that as a principal it cannot be held chargeable with acts of its faithless employees who committed fraud on the bank in direct conflict with the bank's interest. *See* Restatement (Second) of Agency § 282"); *In re Investors Funding Corp. of New York*, F. Supp. , (CCH) Fed. Sec. L. Rep., ¶ 97,696, at p. 89,654 (S.D.N.Y. 1980) (suit under Securities Exchange Act of 1934, "when an agent is acting adversely to the interest of the principal, his knowledge and conduct are not imputed to the principal").

In the Court of Appeals, Hydrolevel attempted to distinguish *Standard Oil* and other cases upon which ASME relied by claiming—without any citation or authority—that those decisions involved criminal prosecutions and that a different rule for vicarious liability should apply in civil cases. This purported distinction, of course, does not apply to the many civil cases upon which ASME relies. See, *e.g.*, *Arthur* v. *Kraft-Phoenix Cheese Corp.*, *supra*, 26 F. Supp. 824 (civil

antitrust case); see also civil cases cited at p. 18, *supra*. Moreover, no decision discussing vicarious liability under the antitrust laws or any federal regulatory statute has ever distinguished between the requirements for civil and criminal cases; indeed, civil decisions frequently rely upon criminal precedents and vice versa. See, *e.g.*, *Shumate & Co., Inc.* v. *National Association of Securities Dealers, Inc.*, 509 F.2d 147, 151 (5th Cir. 1975) (civil action), relying on *United States* v. *Hilton Hotels Corp.*, *supra*, 467 F.2d 1000 (criminal antitrust suit). Furthermore, the *Restatement of Agency* does not distinguish between agency liability in civil and criminal matters. Finally, this distinction makes no sense. When a statute authorizes both a civil suit and a criminal prosecution, the Constitution and traditions of criminal procedure require a heightened showing of *mens rea* for criminal prosecutions, *United States* v. *United States Gypsum Co.*, *supra*, 438 U.S. at 436, and proof beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970). This Court has never suggested, however, that a criminal prosecution requires a special showing of vicarious liability; rather, its decision in *Pinkerton* v. *United States*, 328 U.S. 640, 645-48 (1946), allowing criminal liability based solely on the acts of conspirators, suggests that the principles of vicarious liability in civil and criminal cases are the same. See also Note, Developments in the Law—Conspiracy, 72 *Harv. L. Rev.* 920, 1000, n. 611 (1958) (in discussing liability for antitrust conspiracy, "in practice the Courts do not seem to have distinguished between civil and criminal Sherman Act cases").

These principles of agency liability, utilized by the federal courts in both antitrust cases and other actions under the federal regulatory statutes, clearly require reversal of the jury's verdict for, as the appellate panel tacitly accepted, there was no evidence, or even a logical basis for inference, that Hardin or James intended or could have intended by their illicit acts to benefit ASME, rather than their employers, M&M and Hartford.

In declining to follow the general rule of agency liability, the panel reasoned that "the conduct at issue here is far closer

to the torts discussed in § 247 (defamation); § 248 (interference with business relations); § 257 (misrepresentation); and §§ 261 and 262 (fraud). None of these sections ties the principal's liability to a requirement that the agent act at least in part for the principal's benefit, and several expressly reject such a requirement." A-13; 635 F.2d at 125.* As noted above, however, these principles of vicarious liablity have never been applied in any federal antitrust case, and are implicitly rejected in those federal court decisions, including *Coronado Coal*, requiring actual authority and an intent of the agent to benefit the principal.

Equally important, the panel departed from the rationale for allowing liability upon a showing of apparent authority in the limited category of cases where that principle is followed. Agency decisions not requiring the agent's intent to benefit the principal, and those few sections of the *Restatement* adopting this principle, are based upon the concept of *reliance:* In a limited number of circumstances, a plaintiff should be entitled to rely on an agent's apparent authority, and for this reason the principal is liable for the agent's acts, *to a plaintiff who so relies*, irrespective of the agent's motive. The theory of apparent authority, as set forth in the *Restatement (Second) of Agency* at section 8, is that when the agent's authority has been directly communicated by the principal to a third party, the principal is estopped from denying authority as to that third party. This was emphasized by the Seventh Circuit in *Sennott* v. *Rodman & Renshaw*, 474 F.2d 32 (7th

* These sections are not only inappropriate to an antitrust case, as demonstrated in the text, but are inaccurately summarized by the panel. Comment c to Section 247 (defamation), upon which the panel relies, states that the principal is liable for the acts of an agent "provided that he acts at least in part to serve his employer's purposes." See *Hooper-Holmes Bureau, Inc.* v. *Bunn*, 161 F.2d 102, 104 (5th Cir. 1947) (defamation case; "The defamatory statements made by a servant only for his own purposes, although made during a transaction in which the servant is acting for the corporation, does not subject the corporation to liability."). Similarly, Comment a to Section 248 (interference with business relations) states that an agent's act binds the principal only "if intended for the benefit of the principal or master. . . ." Thus, these sections specifically support ASME's position, and would require reversal of the panel's opinion.

Cir.), *cert. denied*, 414 U.S. 926 (1973), a suit under the federal securities acts. After a brokerage house had been found liable for the acts of one of its agents, the Seventh Circuit reversed because the trial court had erroneously proceeded on a theory of apparent authority:

> "Under Sennott's theory of apparent authority or estoppel, therefore, plaintiff would be required to prove that he was relying upon [the agent's] apparent authority, and hence on Rodman, when he decided to purchase the Skyline options. Reliance is not evident from the record before us."

Id. at 38. Liability based upon apparent authority, in which intent to benefit the principal was not shown, has been upheld only in cases where reliance by the plaintiff on the agent's apparent authority was demonstrated. See, *e.g.*, *Employer's Liability Assurance Corporation* v. *L.J. Marcotte Insurance Agency*, 314 F.2d 470, 474-76 (8th Cir. 1963) (common law fraud case; plaintiff relied upon apparent authority of insurance agent). In such cases, a universal element was that plaintiff himself relied upon the manifestation of authority given by the defendant.

The element of reliance clearly has no application to the antitrust laws generally and is not present in the instant case. First of all, it is anomalous to apply a theory of apparent authority (and its attendant additional element of direct reliance) to laws governing restraint of trade or monopolization, which are designed to protect the marketplace as a whole rather than the individual rights of a specific business. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) ("[t]he antitrust laws, however, were enacted for the protection of *competition*, not *competitors*" citing *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962)) (emphasis in original). In any event, in the instant case Hydrolevel never even saw the April 29, 1971 letter until after the putative damage was done and obviously did not "rely" on the apparent authority of Hardin. Conversely, if one were to assume that prospective purchasers of Hydrolevel's device did rely on the apparent authority of

Hardin to issue the April 29 letter, those putative victims were not parties to this suit.*

In summary, the theory of vicarious liability adopted by the Second Circuit in this case has been rejected not only in every antitrust case reaching the issue but in federal court decisions interpreting other federal regulatory statutes as well. There is thus a square conflict among the Circuits on both the express holding and the underlying reasoning of the panel's decision, and this Court should grant the writ to review this decision.

III. The Panel's Decision Creates An Unwise and Unworkable Policy In The Administration of the Federal Antitrust Laws, And Will Have Disastrous Effects On Many Voluntary Organizations.

In considering the merits of this petition, the Court should be aware that more is at stake than simply the rights and interests of the two litigants—much more. The way in which the questions raised in this petition are answered will profoundly affect the operations and programs of a broad range of professional, technical and voluntary associations which play a vital role in the American enterprise system.

Writers as early as DeTocqueville, see *Democracy in America*, p. 198 (Mentor ed. 1956), have commented on the profound importance of voluntary associations in American life. Voluntary groups serving the public interest—bar associations, doctors, accountants, architects and engineers groups, and community planning boards, to name just a few—mobilize and effectively channel billions of dollars

* The panel noted that the "difference from the usual situation in which the injured party relies directly on the culpable misrepresentations can hardly be material." A-14; 635 F.2d at 125. The issue in the only decision upon which the panel relied for this proposition, *Ricketts* v. *Pennsylvania Ry. Co.*, 153 F.2d 757 (2d Cir. 1946), was whether a tort plaintiff was estopped by a release his lawyer had fraudulently induced him to sign. The Court held that he was not, but "assumed" that if the plaintiff had given the attorney actual authority to settle the claims he would have been so bound. *Id.* at 759. This dictum has no bearing on the issues in this case and has never been applied in any antitrust decision.

worth of manpower and talent for the overall public good. Through the volunteer efforts of these organizations, the quality of American life is enhanced in a number of ways, through improved public safety and product reliability, greater availability and wider dissemination of appropriate equipment and procedures for industry, better educated professionals for the work force of the country, and maintenance of high ethical and professional standards. As the panel acknowledged (A-16; 635 F.2d at 126), professional and technical organizations must and do rely on the expertise and services of individual volunteer members drawn in part from businesses whose economic interest may potentially be affected by the organization's activities.

By adopting a literally unprecedented standard of vicarious liability under the federal antitrust laws, the panel has made such non-profit associations the guarantors of all acts of their members within their loosely-defined "apparent authority"—even if, as here, the organization itself is a deceived victim and the sole intended (and actual) beneficiaries of the improper acts are the member himself and his true principal. This result will be literally devastating to innumerable associations, particularly those whose programs have been widely accepted by government and industry because they effectively serve an important public interest. It takes no feat of imagination to foresee unlimited situations where, as here, a disloyal member of such an organization actively deceives it and secretly allows a third party to misuse the organization's purpose, goals and procedures for its own benefit. The panel's decision will also result in discouraging many of those who would otherwise volunteer their time and talent from so doing and will serve to discourage employers, afraid of increasing their own exposure, from supporting their employees who wish to participate in professional group activities.

Furthermore, the panel's decision is both unworkable and unfair. A linch pin of the panel's decision was its conclusion that ASME had no "internal review procedures" governing interpretation letters, and that James and Hardin acted "without any check or supervision" (A-16; 635 F.2d at 126); the opinion implies that more thorough review procedures

might have immunized ASME from liability. In fact, however, Hardin's draft of the April 29 letter was sent to both the Chairman and the Vice-Chairman of the B-PV Committee for review before release by the Secretary of the Committee. (AX V. 6-7). The letter passed review by those individuals—and undoubtedly would have escaped detection under any system—precisely because no one unaware of M&M's ulterior purpose could possibly have detected the letter's hidden significance. In short, it is impossible to conceive of any workable mechanism for review that would have affected the issuance of the April 29 letter. More generally, any organization can be induced, by a disloyal member familiar with its procedures, into innocently taking a position capable of misuse by a third party. The panel's opinion makes an organization strictly liable for antitrust penalties if a volunteer has a piece of official stationery, a position in the organization, and the guile to misuse both for his own ends. Subjecting an otherwise innocent organization to the awesome potential liability of a treble damage suit for failing to ferret out or detect such disloyalty is both unprecedented and unwise.

Finally, neither common sense nor equity requires the result reached by the panel. Had the lower courts followed the decisions of this Court and the other federal courts and required a showing either that Hardin and James intended to benefit ASME or that ASME knowingly acquiesced in or ratified their acts, this standard would have had no effect on Hydrolevel's claims against the true villains in the matter, Hardin and James and the corporate entities which received the exclusive benefits of their acts. In escalating the potential liability of voluntary, professional associations to allow treble damages under the antitrust laws for "unintentional participation" in the misdeeds of others, the panel has departed from all relevant precedents on the issue and has grossly extended the federal antitrust laws beyond their proper moorings. It has also placed on the backs of all such organizations a potentially insuperable burden which will surely result in a greater loss to the American public than it will produce financial gain for a few plaintiffs.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HAROLD R. TYLER, JR.
30 Rockefeller Plaza
New York, New York 10112
(212) 541-4000

Attorney for The American Society of Mechanical Engineers, Inc.

Of Counsel:

RICHARD D. PARSONS
FREDERICK T. DAVIS
STEVEN C. CHAREN

PATTERSON, BELKNAP, WEBB & TYLER
30 Rockefeller Plaza
New York, New York 10112

Dated: April 22, 1981

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 664-5—September Term, 1979

(Argued March 12, 1980 Decided November 24, 1980)

Docket Nos.: 79-7254, 79-7260

HYDROLEVEL CORPORATION, a New York Corporation,

Plaintiff-Appellee-Cross Appellant,

—against—

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., a New York Corporation,

Defendant-Appellant-Cross-Appellee.

Before:

LUMBARD, FRIENDLY, and MESKILL, *Circuit Judges.*

Appeal from a judgment entered on a jury verdict in the United States District Court for the Eastern District of New York, Weinstein, *Judge*, holding appellant, American Society of Mechanical Engineers, liable for conspiracy to restrain trade and awarding appellee,

Hydrolevel Corporation, damages trebled to $7.5 million.

Affirmed in part; reversed and remanded in part.

HAROLD R. TYLER, JR., Esq., New York, N.Y. (Patterson, Belknap, Webb & Tyler, New York, N.Y., Richard D. Parsons, Esq., Frederick T. Davis, Esq., Steven C. Charen, Esq., of counsel), for *Defendant-Appellant-Cross Appellee.*

CARL W. SCHWARZ, Esq., Washington, D.C. (Metzger, Shadyac & Schwarz, Washington, D.C., Stephen P. Murphy, Esq., William H. Barrett, Esq.; Donald J. Williamson, P.A., New York, N.Y., Michael F. Rehill, Esq., of counsel), for *Plaintiff-Appellee-Cross Appellant.*

LUMBARD, *Circuit Judge:*

The American Society of Mechanical Engineers (ASME) appeals from a judgment of $7.5 million, entered in the Eastern District of New York on February 14, 1979, Judge Weinstein presiding. The jury found that ASME had participated in a conspiracy to restrain trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and assessed damages at $3.3 million. Judge Weinstein deducted from that figure $800,000 paid in settlement by other defendants and then trebled the remainder, awarding total damages of $7.5 million. We affirm

the judgment of liability on a theory different from that of the district court, and remand for a new trial on damages, with instructions regarding the treatment of the settlement payments and the assessment of legal fees.

I. FACTS

ASME is a tax-exempt technical and scientific society founded in 1880 and based in New York. It has more than 90,000 members, drawn from all fields where mechanical engineers are active—including industry, academia, insurance and government—and has an annual operating budget of over $12 million. It conducts educational and research programs, publishes a national magazine devoted to mechanical engineering, and, principally important to this case, promulgates over 400 codes and standards. Those codes have great influence in the profession and the marketplace. Indeed, they have been incorporated by reference into federal, state, and local laws and regulations.[1] Although ASME employs a full-time staff, much of its work is done by volunteers from its membership who participate in ASME as individuals, not as representatives of their employers. Over 10,000 such volunteers participate in the many ASME committees and sub-committees that draft, revise, and interpret ASME's codes. The question in this appeal is whether ASME is liable for the restraint of trade that resulted when two of its highly placed volunteers caused it to issue a misinterpretation of one such code so as to frustrate competition at the expense of Hydrolevel Corporation.

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1 *See, e.g.*, 12 N.Y. Code R. & Reg. §§ 4-1.9, 4-1.10 (1979).

At all relevant times, the Boiler and Pressure Vessel Code set standards for the performance of various components of steam and water boilers and pressure vessels. Section IV of the Code set standards specifically for components of heating boilers, including a device whose name wholly describes its function: the low-water fuel cut-off. If the water inside a boiler drops below a level that is sufficient to moderate the boiler's temperature, the boiler will "dry fire" and can explode. A low-water fuel cut-off cuts off fuel to the boiler, and thus stops it, when the water reaches a certain low point. To ensure that the cut-off operates before the water reaches a dangerously low level, Paragraph HG-605 of Section IV of the Code required that each boiler "have an automatic low-water fuel cut-off so located as to automatically cut off the fuel supply when the surface of the water falls to the lowest visible part of the water-gauge glass" attached to the outside of the boiler.

The leading manufacturer of cut-offs for the last fifty years has been McDonnel & Miller, Inc. (M&M), of Chicago, which annually makes 70%-85% of the sales of "float" cut-offs. The literal nomenclature of this area of mechanical engineering almost wholly explains function: when water in the boiler falls to the critical level, a floating bulb falling with the water trips a switch mechanically linked to the bulb and thus cuts off the fuel. Hydrolevel began in 1965 to manufacture and market a "probe" cut-off which, as its name suggests, penetrates into the water in the boiler. So long as water covers an electrode in the probe, a completed electrical circuit will cause fuel to flow to the boiler; when the water drops below the probe, the circuit is broken and the fuel stops.

Without entering the engineering debate over which kind of cut-off is better, an obviously irrelevant question in this appeal, it must be said that neither was flawless. The one flaw that is relevant was that found in the probe cut-off: because boiling water bubbles and surges inside the boiler, it intermittently falls below the probe and cuts off the fuel although still at a safe level. Hydrolevel therefore incorporated into its probe cut-off a time-delay element that allowed fuel to continue flowing for sixty to ninety seconds after the water fell below the probe. This reduced the fluctuations in the fuel supply caused by bubbling and surging, but still cut off the fuel before the boiler could dry fire if the water actually fell to a critically low point.

In early 1971, a major purchaser of cut-offs, Brooklyn Union Gas Co., had decided to change to Hydrolevel's time-delay probe after years of purchasing M&M's float. At the same time, M&M arranged to use ASME code interpretation procedures to stifle Hydrolevel's competition. John W. James, the Vice-President in charge of Research at M&M, was the Vice-Chairman of the Section IV Subcommittee of ASME which drafted, revised, and interpreted Section IV of the Boiler and Pressure Vessel Code. The Chairman of the Subcommittee was T. R. Hardin, an Executive Vice-President of Hartford Steam Boiler Inspection and Insurance Company (Hartford), the country's leading underwriter of boiler insurance.[2] In March 1971 James and Hardin, along with James Solon, the President of M&M, and Eugene Mitchell, its Vice-President of Sales, decided to send to the

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2 International Telephone and Telegraph had just acquired a controlling interest in Hartford. At the same time, M&M was initiating what were to become successful negotiations to be acquired by the same firm. ITT completed its acquisition of M&M in December of 1971.

Boiler and Pressure Vessel Committee a letter inquiring whether a cut-off with a time-delay met the standard of Paragraph HG-605. James and Hardin drafted a letter of inquiry that they believed would elicit a negative answer. On April 12, Mitchell signed the letter and sent it to W. Bradford Hoyt, the Secretary of the Boiler and Pressure Vessel Committee, who was a full-time ASME officer. The letter asked, after paraphrasing Paragraph HG-605:

> Is it the intent of this statement that the cut-off operate immediately when the boiler water level falls to the lowest visible part of the water-gauge glass, or is it permissible to incorporate a time-delay feature in the cut-off so that it will operate after the boiler water level reaches some point below the visible range of the gauge glass?

As Secretary of the Boiler and Pressure Vessel Committee, Hoyt processed such written inquiries according to § 8 of the Boiler and Pressure Vessel Committee Procedure. Many inquiries could be answered with form letters authorized in § 8.01. For inquiries that could not be answered by a form reply, § 8.02 provided that the "Secretary shall immediately refer such matters to the Chairman of the proper Subcommittee or to a Special Committee appointed by the Chairman or Vice-Chairman in cases where no other procedure is evident." The April 12 inquiry from M&M could not be answered with one of the form letters under § 8.01, so Hoyt referred it under § 8.02 to Hardin, the "Chairman of the proper Subcommittee."

ASME's procedures then put Hardin in unsupervised control of its response to the inquiry. Under § 8.02, an inquiry that could "be answered by direct reference to

the Code" would receive an "unofficial communication" from ASME. In such instances, "the subcommittee or special committee chairman shall outline the reply to be sent by the Secretary." An inquiry that could not be answered with an unofficial communication would receive, under the other subsections of § 8.02, the attention of the entire subcommittee. Hardin, however, treated the April 12 inquiry as one requiring only an unofficial communication and, accordingly, only his attention. ASME provided no review of Hardin's discretion to respond unofficially to the inquiry. He drafted a reply and sent it to Hoyt, who on April 29 sent an answer to Mitchell, which in pertinent part stated as follows:

> A low-water fuel cut-off is considered strictly as a safety device and not as some kind of an operating control. Assuming that the water gauge glass is located in accordance with the requirements of Par. HG-602(b), it is the intent of Par. HG-605(a) that the low-water fuel cut-off operate immediately and positively when the boiler water level falls to the lowest visible part of the water gauge glass.
>
> There are many and varied designs of heating boilers. If a time delay feature were incorporated in a low-water fuel cut-off, there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period.

The second paragraph of this letter does not follow from the first. Whether a cut-off with a time-delay will assure that the water level will not fall dangerously low during the delay depends upon where on the boiler the cut-off is positioned vis-a-vis the water-gauge glass. If

the cut-off is positioned sufficiently above the lowest permissible water level, a cut-off with a time-delay could assure, even allowing for the delay, that the fuel supply would stop by the time the water fell to the lowest visible part of the water-gauge glass. The letter's first paragraph takes the distance between the cut-off and water-gauge glass into account by referring to Paragraph HG-602(b), which sets the location of the water-gauge glass on the boiler. The second paragraph does not take that distance into account and therefore draws its misleading conclusion.

Despite that failure in logic, the ASME answer proved to be valuable M&M propaganda. M&M included a copy of the April 29 answer in its booklet entitled "The Opposition—Who They Are, How to Beat Them," which M&M distributed to its salesmen. Further, a message from Mitchell in the booklet described Hydrolevel's cut-off and its time-delay and stated:

> A time-delay of any kind in the firing device circuitry would very definitely be against the ASME Code which clearly stipulates the firing device must be shut down at the lowest visible portion of the gauge glass. A time delay would defeat the intent of the ASME Code and this should definitely be brought to the attention of anyone considering the device which included a time delay in the low water cut-off circuitry.

Not surprisingly, copies of ASME's April 29 answer soon reached the hands of customers in the cut-off market.

Hydrolevel first learned about the April 29 answer in January, 1972, from an erstwhile customer. Hydrolevel's Vice-President, Dominic DeLeonardis, requested a copy of the letter from Hoyt. On February 8, an Assistant

Secretary of the Boiler and Pressure Vessel Committee, R. D. Sutton, sent to DeLeonardis a letter that quoted both substantive pargraphs of the April 29 answer but did not reveal, pursuant to ASME's policy of maintaining inquirers' anonymity, that the inquirer had been M&M. After seeing the April 29 letter and recognizing its second paragraph as misleading, and believing that ASME itself had distributed the letter to the cut-off market, Hydrolevel's President, Russel Rymer, complained to Hoyt on March 23, 1972 that the letter had seriously impaired Hydrolevel's sales. Rymer urged that ASME send to whomever might have received the letter a statement that a cut-off with a time-delay can meet the Boiler and Pressure Vessel Code. In response, Hoyt placed the matter of the April 29, 1971 letter on the agenda for the next meetings of the Boiler and Pressure Vessel Committee and Subcommittee, May 4 and 5, 1972.

When the Subcommittee met on May 4, James presided, having succeeded to the chairmanship after Hardin resigned. Among many items of business at this meeting, which like all ASME committee and subcommittee meetings was public, the Subcommittee discussed Rymer's complaint. During that discussion James stepped down from the chair. The Subcommittee voted to "confirm the intent of the first paragraph" of the April 29 letter. James reported this recommendation to the Committee meeting on May 5, along with the Subcommittee's recommendations on other matters. The Committee voted to send Hydrolevel an "official communication", rather than simply reaffirm the first paragraph, and it appointed two Committee drafters. The drafters proposed, the Committee approved, and on June 9, 1972 Hoyt sent to Rymer a letter that reversed

the implication of the April 29 answer by stating "there is no intent in Section IV to prohibit the use of low water fuel cutoffs having time delays in order to meet the requirements of Par. HG-605(a)." [3]

Two years later, on July 9, 1974, the *Wall Street Journal* printed an article called "Knocking the Competition—How Rival's Use of 'Industry Code' Report Created Problems for Tiny Company." The article reported Hydrolevel's difficulties in attempting to sell a cut-off which the market still believed did not meet the Code, and it suggested that "a marketing ploy" by M&M had created that belief. It also reported that James had known about the inquiry—but did not report that James in fact had helped draft the inquiry—and it implied that a conflict of interest existed between James's position at M&M and on the Subcommittee.

The article's suggestions of impropriety prompted ASME's Professional Practice Committee to investigate, but it never discovered James's implication in the April 12 inquiry. On the facts before it, the Committee concluded that Hoyt, Hardin, and James had each acted properly. The Committee reopened its investigation, however, in March 1975, after James revealed for the first time, while testifying before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, that he had helped draft the April 12 inquiry and that he had destroyed his correspondence with Hardin after learning about the *Wall Street Journal* investigation from Hoyt. Upon the advice of ASME's counsel, the Committee deferred further action pending this lawsuit, which Hydrolevel commenced on August

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[3] The text of the June 9, 1972 letter is reprinted in Section III of this opinion.

23, 1975, against ASME, M&M, and Hartford. In early 1979, Hydrolevel sold all its assets except this suit for $86,000 salvage value.

M&M settled with Hydrolevel for $725,000; Hartford settled for $75,000, leaving ASME to go to trial alone.[4] The district court first tried the issue of liability, and on January 30, 1979, after a seven-day trial, the jury found that ASME had conspired to restrain trade in the cut-off market. The same jury then heard evidence on the issue of damages. Hydrolevel presented three experts who offered estimates of Hydrolevel's injuries, ranging from $2,358,000 to $7,436,300 based on harms forecast as far in the future as 1988. ASME's only expert witness on damages disputed the methods of computation used by Hydrolevel's experts but offered no alternative damage estimates. ASME's principal defense was that Hydrolevel's losses had been caused by inadequate sales promotion and a defective product rather than by any ASME misrepresentation.

On February 2, 1979, the jury found that Hydrolevel had suffered damages of $3.3 million. Judge Weinstein reduced the damages by the $800,000 settlements to $2.5 million, trebled that, and entered a judgment for $7.5 million. He also denied attorneys' fees for Hydrolevel. ASME appeals from the liability verdict and the damage assessment; Hydrolevel cross-appeals from Judge Weinstein's deduction of settlements before trebling and his refusal to grant attorneys' fees.

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4 The jury was not told about M&M's and Hartford's settlements, and the district court charged the jury, "Do not speculate on why ITT or Hartford Steam or anybody else, individual or institution, is not in the case. You have only one issue before you. Is this defendant liable? That's all." *See* Fed. R. Evid. 408.

II. LIABILITY.

We affirm the jury's verdict of liability under § 1 of the Sherman Act, a verdict based upon a finding that ASME had conspired with others to restrain trade unreasonably in the low-water cut-off market by disparaging Hydrolevel's cut-off through a misinterpretation of the Boiler and Pressure Vessel Code. Given the effect and intent of the April 29 interpretive letter and its subsequent misuse by M&M, the restraint was surely unreasonable: it intentionally misinterpreted the Code so as to prevent Hydrolevel from selling its product. The more troublesome question, which we also decide in favor of Hydolevel, is whether ASME may be held liable as a conspirator because of the acts of its agents.

Although we affirm the jury's verdict, we do so on a theory different from that embodied in the instructions to the jury. In its Request Number 28, Hydrolevel requested that Judge Weinstein charge the jury that ASME would be responsible for its agents' actions if they acted within the scope of their apparent authority, even if they did not intend to benefit ASME. Judge Weinstein, however, rejected that view and instructed the jury that ASME was not liable for its agents' acts unless (1) ASME ratified those acts or (2) the agents had acted to advance ASME's interests. He charged:

> Now the law holds a corporation responsible for the unlawful act of its agents or officers but only when those unlawful acts are performed within the scope of the authority of the officers and on behalf of the corporation.
>
> . . .

> If the officers or agents act on behalf of interests adverse to the corporation or acted for their own economic benefit or the benefit of another person or corporation, and this action was not ratified or adopted by the defendant, their misconduct cannot be considered that of the corporation with which they are associated.

The argument on this appeal centered on whether the evidence justified a verdict for Hydrolevel under either of the district court's theories. We need not resolve that dispute, for we hold that the district court erred in refusing Hydrolevel's requested jury instruction that incorporated an apparent authority theory.

The district court charged the jury that ASME could be held liable only if the jury found that ASME had ratified the acts of its agents or if the agents had acted to advance ASME's interests. That is the appropriate theory for conventional torts. *See* Restatement (2d) of Agency §§ 235, 236. The conduct at issue here, however, is far closer to the torts discussed in § 247 (defamation); § 248 (interference with business relations); § 257 (misrepresentation); and §§ 261 and 262 (fraud). None of these sections ties the principal's liability to a requirement that the agent act at least in part for the principal's benefit, and several expressly reject such a requirement. See § 257, comment d; § 261, comment a; § 262. Under these sections it is likewise immaterial that the agent knows the transaction to be a sham. *See* § 261, comment a and illustration 3. The leading case holding the principal liable where the agent commits fraud while acting within the scope of his apparent authority, although without intention to benefit the principal, is Mr. Justice Stone's opinion in *Gleason v.*

Seaboard Air Line Co., 278 U.S. 349 (1929), which since then has not been questioned.

The reasons for this stringent treatment of intentional torts are not difficult to find. Such torts arise from and are enhanced by the agent's appearance of authority. Third persons—here the customers to whom M&M's circulated the misleading ASME letter—are entitled to rely on that appearance. Moreover, as stated in § 247, dealing with defamation, the act of the agent "is effective, in part at least, because of the personality" of the principal. Or, as said in § 261, comment a, dealing with fraud:

> [L]iability is based upon the fact that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him.

Imposing liability on the principal will induce greater care to prevent misconduct by agents occupying especially sensitive or responsible positions that invite reliance—a consideration of great importance in cases such as this where misuse of quasi-official standards and codes can so easily injure competitors.

Hardin's conduct here was essentially a fraud, a willful and knowing misrepresentation of the Code. The victims, however, were those customers to whom he knew M&M would circulate the letter as well as, ultimately and most seriously, the plaintiff. This difference from the more usual situation in which the injured party relies directly on the culpable misrepresentations can hardly be material. In *Ricketts v. Pennsylvania R. Co.*, 153 F.2d 757, 759 (2d Cir. 1946), we held that there is

"no distinction in principle" between the situation in which the agent deceives the third person "and one in which the agent deceives, not the third person, but his principal." Alternatively, the tort could be regarded as "injurious falsehood." *See* Prosser, Torts § 128 at 915-26 (4th ed. 1971); Restatement (2d) of Torts § 623A. As to this, the Restatement (2d) of Agency tells us, § 248 comment b, that where "harm to business relations is accomplished by defamation or other methods of untruthful publicity, a servant with apparent authority to make statements binds his employer, irrespective of his motive . . . ."[5]

A conspiracy to restrain trade is so similar to fraud, injurious falsehood, and tortious interference with business relations that application of the Restatement rules governing those torts is appropriate. Moreover, ASME's widespread influence through its Code carries with it a corresponding duty to guard against the misuse of such influence. It is difficult to see how a trade association should be treated any differently than a business competitor, especially when it is the association's standing and influence that makes the conspiracy effective and possible. In a variety of contexts, trade associations are obligated to take suitable precautions to avoid antitrust violations. *See* Symposium, *Trade and Professional*

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[5] Again, if Hydrolevel had sued ASME for what the New York courts have called a "prima facie tort," *see* W. Prosser, Torts § 130 at 953-54, we see no possible basis on which a verdict in its favor could properly be disturbed on the ground of lack of authority on the part of Hardin. Hydrolevel originally sought to hold ASME liable for trade libel, tortious interference with business relations, and violation of New York's Donnelly Act, N.Y. Gen. Bus. L. § 340 (McKinney 1968), which proscribes, *inter alia*, agreements for the purpose of establishing or maintaining monopolies and "[f]or the purpose of unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce." With court approval, Hydrolevel abandoned all of its state law claims before trial.

Associations: The Antitrust Combat Zone, 46 Antitrust L.J. 638 (1977). While ASME may have no alternative to staffing its committees with business people having practical knowledge, there is a corresponding duty to be aware of and guard against the temptations thus afforded by inherent conflicts of interest. Absent some internal review procedures, no individual should be empowered to rule dispositively on the fitness of a competitor's product. When an organization has placed a person in a position to do what Hardin did, without any check or supervision, it must bear the consequences.

Two considerations opposing this more stringent rule of liability warrant brief mention: the treble damages provision in § 4 of the Clayton Act and the non-profit, voluntary aspects of trade associations such as ASME. The first consideration suggests that broad agency theories of liability are inappropriate where treble damages are required. For example, in *United States v. Ridglea State Bank,* 357 F.2d 495 (5th Cir. 1966), the court rejected an expansive agency doctrine in a case under the False Claims Act, 31 U.S.C. § 231 et seq. (1976), because the Act's double damages provision provides "a recovery wholly out of proportion to actual loss." 357 F.2d at 500.[6]

In our view, the treble damages accorded under the antitrust laws are distinguishable. In contrast to a private antitrust action, the United States need not suffer actual damages before collecting penalties under

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[6] *See also Asphalt Industries, Inc. v. Commissioner,* 384 F.2d 229 (3d Cir. 1967) (corporation held not liable for tax fraud penalties caused by fraudulent acts of its president against the interest of the corporation). Restatement (2d) Agency § 217C also restricts the imputation of liability for punitive damages but says that the rule there stated does "not apply to the interpretation of special statutes such as those giving triple damages, as to which no statementis made." § 217C, comment c.

the False Claims Act. *See United States v. Cherokee Implement Co.*, 216 F. Supp. 374, 375 (N.D. Iowa 1963), and cases cited therein. The comparatively more punitive False Claims Act award includes not only a double damage remedy but also fixed forfeitures for each violation of the act. *See Ridglea, supra,* 357 F.2d at 499.

Beyond this, restraint of trade was, under the common law, a variety of business tort that was remedied through restitution. *See* Comment, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business,* 80 Harv. L. Rev. 1566 (1967). *See also Standard Oil Company of New Jersey v. United States,* 211 U.S. 1, 50-69 (1911); *Williamson v. Columbia Gas & Electric Corp.*, 110 F.2d 15, 17-18 (3d Cir. 1940).[7] Full restitution of plaintiffs' losses is a no less central objective of the treble damage provision than the encouragement of private antitrust enforcement. *See Illinois Brick Co. v. Illinois,* 431 U.S. 720, 746-47 (1977); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-87 (1977); K. Elzinga & W. Breit, The Antitrust Penalties 66-67 (1966); Comment, *supra,* at 1566-67.

Unlike the False Claims Act penalties, where damages are doubled although the government's losses are readily ascertainable, the trebling of damages under the antitrust laws reflects congressional recongition of the difficulty of proving antitrust damages. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra,* 429 U.S. at 486 n.10; K. Elzinga & W. Breit, *supra,* at 67; Comment, *supra,* at 1566. Thus, we see no reason why the treble

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[7] The treble damage formula itself seems to have been taken from an early English antimonopoly statute. *See* "An act concerning monopolies and dispensation with penal laws and forfeitures thereof," 21 Jac. I. c. 3 1623; K. Elzinga & W. Breit, The Antitrust Penalties 63-64 (1976).

damage provision of the Clayton Act should compel a restricted view of agency law.

That brings us to the second consideration affecting ASME's liability: whether ASME's unique structure or status should mandate a different result. We conclude that it should not. ASME's reliance on *Coronado Coal Corp. v. United Mine Workers*, 268 U.S. 195 (1925), is misplaced; that decision held that an international union may not be held liable for a Sherman Act violation by leaders of a local where, under the constitution of the International, it could only accept authority for the action by express ratification. *Id.* at 304. ASME's protest that its status as a professional organization requires more flexible treatment than would be accorded an ordinary corporation is similarly unpersuasive. Dicta indicating more flexible and lenient treatment of professional organizations in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-89 (1975), and *National Society of Professional Engineers v. United States*, 435 U.S. 679, 696 (1978), concern the antitrust consequences of such organizations' regulation of their own members. *See generally* Handler, *Antitrust—1978*, 78 Colum. L. Rev. 1363, 1364-68 (1978). The dicta of those cases refer only to uniform regulation of the professional conduct of an association's members. By contrast, this case involves the radically different situation where a professional organization having great economic influence is implicated in a conspiracy to restrain competition to the injury of third parties and the public. *See, e.g., United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (corporation criminally liable for boycott participation by purchasing agent disobeying express instruction and motivated by personal pique against boycott target); *Northern Califor-*

nia Pharmaceutical Ass'n v. United States, 306 F.2d 379-86 (9th Cir. 1962) (professional organization subject to Sherman Act where its activities are of precisely the sort that Act condemns).

For ASME to be liable, then, Hydrolevel had to demonstrate only that ASME's agents acted within their apparent authority when participating in the conspiracy; it did not have to demonstrate that they also acted in part to benefit ASME or that ASME later ratified their actions. The district court's charge required either one of those two additional aspects and consequently was more favorable to ASME than it should have been. As the jury found for Hydrolevel on a charge that was more favorable to the defendant than the law requires, we affirm the judgment on liability.

III. ALLEGED TRIAL ERRORS

ASME argues that several errors at trial require reversal of the jury's liability determination. Principally, ASME asserts that the district court erred in admitting four pieces of evidence: the July 1974 *Wall Street Journal* article that contained a concise and apparently corroborating account of Hydrolevel's charges; references to the FTC and Senate Subcommitee investigations of Hydrolevel's charges; the deposition of John Bonner, the chairman of a plumbing supply company, who had been included in ASME's list of possible expert witnesses but who gave testimony damaging to ASME in his pretrial deposition and was never called at trial; and finally, the alleged hearsay testimony of DeLeonardis on conversations with potential Hydrolevel customers who indicated concern that Hydrolevel's device did not meet ASME requirements. We find no error in the admission of this evidence.

The most serious objection raised by ASME concerns the *Wall Street Journal* article. But, to the extent that the article addressed the circumstances attending M&M's April 12 inquiry and ASME's April 29 response, its account was considerably less damning than the facts developed at trial. More important, the article was admitted only to demonstrate the state of mind of those who reacted to it: Hoyt's advising James about the article and James' response in destroying the ASME correspondence file on the subject were relevant to Hydrolevel's ratification argument. The *Journal* article led the ASME directors to call for an investigation that Hydrolevel asserts was never meant to uncover anything. To avoid any undue prejudice, Judge Weinstein instructed the jury initially that the article was not admitted for the truth of its assertions and, in his charge, directed the jury not to read it at all. Taken together, those considerations suggest that admission of the article did not consitute error.

The remaining evidentiary objections are without merit. Mere mention of the FTC investigation and Senate hearings was not impermissibly prejudicial in light of the court's strong cautionary instructions. The Bonner deposition was admitted for the limited purpose of indicating how the April 29 letter might be interpreted in the industry. Although the district court never certified Bonner as an expert, there is no doubt that Bonner, as a businessman, engineer, and potential ASME expert, was qualified to provide expert testimony. Finally, the alleged DeLeonardis hearsay regarding responses of potential customers is expected from the hearsay rule by Fed. R. Evid. 803(3). "Statements of a customer as to his reasons for not dealing with a supplier are admissible for this limited purpose . . . ." *Herman Schwabe, Inc.*

v. United Shoe Machinery Corp., 297 F.2d 906, 914 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962) (citations and footnote omitted); J. Weinstein and M. Berger, Weinstein's Evidence ¶ 803(3)[03] (1979).

In addition to its evidentiary objections, ASME asserts that Hydrolevel's counsel's misstatements and emotionalism during summation require a new trial. We do not agree. Judge Weinstein's rulings regarding the summation were well within his discretion. ASME's trial counsel had ample opportunity to set the record straight during his own summation. In any event, on retrial of damages it should be made clear that misstatements of evidence and extravagant and hyperbolic language and displays of emotion by Hydrolevel's counsel must be avoided.

IV. DAMAGES

We reverse the judgment as to damages and remand for a new trial. The jury returned a verdict of $3.3 million; but, as ASME argues, the verdict was excessive and should not stand. Although the trial judge did not say in so many words that the damage verdict was excessive, he was obviously of the view that the verdict was excessive. In passing on ASME's motion to set aside the verdict and on Hydrolevel's motion for counsel fees, and in directing judgment on the verdict, the trial judge did all he could to reduce the judgment, short of granting a new trial or directing a remittitur in lieu of a new trial. First, the judge deducted the $800,000 already paid in settlements from the $3,300,000 before trebling—which, for reasons stated below, we find to be error. Next, the judge denied the application for counsel fees on the ground that with such a large judgment the

grant of counsel fees was not necessary. This also we find to be error.

Review of the record leads to the inescapable conclusion that the verdict was grossly excessive. Hydrolevel had opeated at a loss in each of the six years preceding the April 1971 letter and it continued to do so in the years following the June 1972 letter of retraction. Hydrolevel's experts were permitted to testify to long-term damage estimates extending to the year 1988 on the tenuous theory that it would take that long to recover fully from the April 1971 interpretation. Moreover, these estimates were based on the assumption that Hydrolevel would gain 10 to 25% of the market, although it had never at anytime reached 1% of the market. Thus, the experts estimated loss profits for eight years ranging from $2,358,000 to $4,406,300 and lost going concern figures in excess of $3,000,000.[8]

The estimates of the experts regarding lost sales were open to serious question for two additional reasons: they relied on lost sales in the international market due to M&M's exclusive distributorship with Honeywell—an agency relationship whose relevance to lost sales was never explained—and to alleged predatory pricing by M&M as to which there was no evidence.

But we see no need to detail all the uncertainties and errors in the presentation of the plaintiff's damage evidence. ASME's responsibility for the damage caused Hydrolevel by the conspiracy extends only to those damages incurred during the period when M&M was able to mislead customers and potential customers about

[8] Although ASME did not object to these damage estimates when they were introduced, it did move at the close of the plaintiff's damage case to strike the plaintiff's experts' computations "as based entirely on supposition and guesswork." Judge Weinstein denied that motion.

the interpretation of the ASME code standards. The June 1972 letter was a retraction of the April 1971 interpretation. It stated:

> This will advise that there is no intent in Section IV to prohibit the use of low water fuel cutoffs having time delays in order to meet the requirements of Par. HG-605(a). This paragraph relates itself to Par. HG-602(b) which specifically delineates the location of the lowest visible part of the water gauge glass.
>
> If a means for retarding control action is incorporated in a low-water fuel cutoff, the termination of the retard function must operate to cutoff the fuel supply before the boiler water level falls below the visible part of the water gauge glass.

The draft of the retraction was sent to over 300 people active in the boiler market. Thereafter, Hydrolevel distributed the June 1972 letter to customers and potential customers. As ASME's sole contribution to the conspiracy was the April 1971 letter, a suitable retraction of the misinterpretation in the April 1971 letter was all that was required to free it from further liability for any damages caused by the conspiracy. Thus, its responsibility for damages was at an end when it provided Hydrolevel with the means of correcting the false impressions caused by the April 1971 letter which M&M had been using. Although ASME never sought at trial to limit the liability for damages by reason of the June 1972 letter, apparently because the district court framed the issues along other lines which made such a limitation seem inconsistent with the position asserted by ASME throughout the trial, the issue of limitation of damages

is available to ASME upon a retrial to determine damages.[9]

As the record on retrial may be more complete on this issue, we leave it to the district court to determine whether the jury should be instructed regarding a time limitation on damages or whether there are factual issues as to the retraction and its effectiveness which the jury must first decide before assessing damages. There are clues in Hydrolevel's summation and in DeLeonardis's testimony that Hydrolevel believed the retraction to have been somehow defective, but those arguments were never developed at trial. One asserted difficulty is that the retraction did not refer to the April 1971 letter, but rather to a later interpretation of that letter sent to Hydrolevel that was dated February 8, 1972. Although DeLeonardis suggested that further steps by ASME, such as publication of a retraction, would have helped Hydrolevel, the record shows no evidence of Hydrolevel ever having complained that the letter was insufficient or ever having requested further aid. Finally, Hydrolevel demonstrated that the second paragraph of the retraction was inserted largely at the urging of James, but Hydrolevel's argument in summation failed to describe what harm that second paragraph could have caused. The record does reveal two attempts by Hydrolevel to use the June 1972 retraction to repair its reputation. We leave the consideration of these possible claims to the trial court.

Consequently, we hold that, if on retrial no further proof is offered regarding ASME's retraction, the district court should instruct the jury to consider only damages incurred from April 1971, the date of the

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[9] Nor did ASME ever argue to the jury the significance of the June 1972 letter.

initial misrepresentation, until a reasonable time after June 9, 1972, the date of Hoyt's correction letter.

As stated above, it was error for the district court to deduct the $800,000 already paid in settlement, from the jury verdict, before trebling the verdict. The district court should first treble the amount of the jury's verdict and then subtract the $800,000 already paid in settlements. In *Flintkote Co. v. Lysfjord,* 246 F.2d 268 (9th Cir. 1957), the Ninth Circuit presented three convincing reasons for trebling damages before deducting settlement proceeds. First, the antitrust laws provide that the plaintiff should receive three times the proven actual damages. If settlement proceeds are deducted before trebling, the plaintiff's total award is less than what the law allows. Since antitrust defendants are joint tortfeasors, each is liable to complete the total deserved damages irrespective of fault. Second, as discussed above, one purpose of the trebling provision is to encourage private plaintiffs to bring suit. Any ultimate recovery totaling less than three times proven damages would weaken the statutory incentive through judicial construction. Third, deduction of settlement proceeds before trebling would discourage settlement by making litigation relatively more profitable for plaintiffs: every dollar received in settlement would cause a three dollar reduction in the judgment at trial. Accord, *Semke v. Enid Automobile Dealers Assoc.,* 320 F. Supp. 445 (W.D.Ok. 1970); *Bal Theatre Corp. v. Paramount Film Distributing Corp.,* 206 F. Supp. 708 (N.D.Cal. 1962); Note, *Contribution and Antitrust Policy,* 78 Mich. L. Rev. 889, 906 n.87 (1980). We find that reasoning persuasive.

The district court also erred in denying reasonable attorneys' fees to Hydrolevel. Section 4 of the Clayton

Act, 15 U.S.C. § 16 (1976), expressly requires such an award. *Baughman v. Cooper-Jarrett, Inc.*, 530 F.2d 529, 531 n.2 (3d Cir.), *cert. denied*, 429 U.S. 825 (1976). In determining fees, consideration should be given to any amounts that may have been paid to Hydrolevel's counsel from the settlement money or by the settling parties, and the amount of time spent in preparing the case against M&M and Hartford, both of whom were far more culpable than ASME.[10]

A restriction of expert testimony on damages, limitation of the period for which ASME is responsible, and a charge by the court which provides some specific guidance beyond mere generalities should result in a verdict more in keeping with the harm Hydrolevel suffered and ASME's unintentional participation.

We thus affirm the judgment on liability. We reverse the judgment on damages and remand for a redetermination of damages and counsel fees in accordance with this opinion. Jurisdiciton is retained.

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10 We note that the matter of contribution among joint tortfeasors in antitrust suits is before the Supreme Court in *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979), *cert. granted sub nom. Texas Industries Inc. v. Radcliffe Materials*, No. 79-1144 (Nov. 3, 1980). *See also Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 98th Cir. 1979); Note, *Contribution in Private Antitrust Actions*, 93 Harv. L. Rev. 1540 (1980); Note, *Contribution and Antitrust Policy*, 78 Mich. L. Rev. 890 (1980).

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

FILED: JAN. 22, 1981
A. Daniel Fusaro, Clerk

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 22nd day of January, one thousand nine hundred and eighty-one.

HYDROLEVEL CORPORATION, a New York Corporation

Plaintiff-Appellee
Cross-Appellant

—against—

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., a New York corporation,

Defendant-Appellant
Cross-Appellee.

No. 79-7254
79-7260

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant-cross-appellee, the American Society of Mechanical Engineers, etc.,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/A. Daniel Fusaro,
Clerk

Sherman Act, Sections 1-2
15 U.S.C. §§ 1-2

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Office - Supreme Court, U.S.
FILED
SEP 28 1961
ALEXANDER L. STEVAS,
CLERK

No. 60-1765

In the Supreme Court of the United States

OCTOBER TERM 1961

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., *Petitioner*,

v.

HYDROLEVEL CORPORATION, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

HAROLD L. TYLER, JR.
Patterson, Belknap, Webb & Tyler
30 Rockefeller Plaza
New York, New York 10020
(212) 582-6500
Counsel for Petitioner

CARL W. BATTLE
Morgan, Shadyac & Battle
One Farragut Square South
Washington, D.C. 20006
(202) 347-1234
Counsel for Respondent

PETITION FOR CERTIORARI FILED APRIL 24, 1961
CERTIORARI GRANTED JUNE 12, 1961

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"PX" refers to a Plaintiff's Exhibit in the District Court;

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IN THE

United States District Court

FOR THE EASTERN DISTRICT OF NEW YORK

DOCKET ENTRIES [App. 1-12*] No. 75 Civ. 1360

HYDROLEVEL CORPORATION [v.] I.T.T., et al

HYDROLEVEL CORPORATION, a New York Corporation

~~INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION, a Delaware Corporation,~~

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., a New York Corporation, and

~~THE HARTFORD STEAM BOILERS INSPECTION AND INSURANCE COMPANY, a Connecticut Corporation~~

15 U.S.C. §§ 1, 2, 7, 15, 18, 26
VIOLATION OF CLAYTON ACT AND SHERMAN ACT. RESTRAINT OF TRADE
Seeks: Injunction

ATTORNEYS

For PLAINTIFF: Carl W. Schwarz
Henry M. Lloyd
Metzger, Noble, Schwarz & Kempler
One Farragut Square South
Washington, D.C. 20006
(202) 347-1631 for Murphy

Donald J. Williamson
Burgonyne, Michels, Rose & Williamson
551 - 5th Avenue
Tower Suite, 37th Floor
New York, N.Y. 10017
(212) 986-0060

For AMERICAN SOCIETY MECH:
CARTER, LEDYARD & MILBURN
2 Wall Street
N.Y., N.Y. 10005
732-3200

•••

[* The trial court docket entries are set forth in their entirety at pp. 1-12 of the Appendix ("App.") submitted to the Court of Appeals.]

8/19/75	Complaint filed. Summons issued.	(1)
•••		
9/12/75	ANSWER of deft [ASME] filed.	(5)
9/22/75	ANSWER of Hartford Steam Boiler Inspection and Insurance Co. filed.	(6)
•••		
9/26/75	AMENDED ANSWER of the American Society of Mechanical Engineers filed.	(8)
•••		
10/21/75	ANSWER and counterclaim filed (of Deft ITT).	(11)
•••		
10/30/75	Answer to Counterclaims filed	(15)
•••		
4/7/76	By WEINSTEIN, J. Order dtd 4-5-76 that the motion of The American Society of Mechanical Engineers for leave to serve a second amended answer is granted filed.	(46)
4/8/76	Notice of Entry filed.	(47)
4/8/76	Second Amended Answer filed. (THE AMER. SOCIETY OF MECH. ENGS.)	(48)
•••		
5/25/76	Notice to take deposition of T. Hardin filed.	(52)
•••		
8/9/76	Suggestion of death upon the record of T. R. Hardin filed.	(64)
•••		
6/8/77	First amended answer & counterclaim of ITT filed. mg	(89)
•••		
10/12/77	WEINSTEIN, J.—order of dismissal with prejudice as to deft Hartford Steam Boiler & Insurance Co. filed. ld	(110)
•••		

6/6/78	By WEINSTEIN, J.—Order dtd 6/6/78 dosmissing [sic] action with prejudice, filed. jm Clerk directed to close case. jm (As to ITT only)	(153)
•••		
9/18/78	By WEINSTEIN, J.—Order dtd. 9/18/78 GRANTING stipulation that pltff be granted leave to file its First Amended Complaint and deft ASME leave to file its amended Answer filed rh.	(163)
•••		
12/18/78	AMENDED ANSWER of deft The American Society of Mechanical Engineers ("ASME") to "First Amended Antitrust Complaint" filed rh	(192)
•••		
1/22/79	Before WEINSTEIN, J.—Case called. Both sides present. Pltff withdraws counts 2, 3, & 4 of complaint & are to go to trial on count one of complaint. Parties agree to try issue of liability first. Trial ordered and begun. Jurors were selected and sworn; pltff opens; deft opens; Trial contd to 1/23/79. filed rh	....
1/23/79	Before WEINSTEIN, J—Case called. Trial resumes. Trial cont'd. to 1/24/79. ls	....
1/24/79	Before WEINSTEIN, J.—Case called. Trial resumes. Trial continuted [sic] to 1/25/79 rh	....
1/25/79	Before WEINSTEIN, J.—Case called for trial, trial resumed. Pltff re: Defts motion for a directed verdict denied. Trial contd to 1/26/79.	....
1/26/79	Before WEINSTEIN, J.—Case called for trial and trial resumed. Trial contd to 1/29/79. fy	....

1/29/79 Before WEINSTEIN, J.—Case called. Trial resumes. Deft rests. Deft's motion for mistrial denied. Deft's motion to strike from Pltff's case all references to Wall Street Journal article, etc. denied: Deft's motion to strike from evidence all reference of anti-competitive actions, etc. denied; Deft's motion for directed verdict denied. Court reviews jury charge with counsel. Summation by Pltff. Summation by Deft. Rebuttal by Pltff. Trial cont'd. to 1/30/79, at 9 a.m. Is ....

1/31/79 Before WEINSTEIN, J.—Case called. Trial resumes. Court charges jury. Jury retires for deliberations at 10:00 a.m. Order of sustenance signed (lunch) at 4:45 p.m. jury returns, finding for the pltff. Finding the deft liable. Motion to set aside verdict denied. Trial on liability concluded. Trial on damages to commence 1/31/79 at 10:00 a.m. Is ....

1/31/79 Before WEINSTEIN, J.—Case called; trial on damages ordered & begun; Jury on liability still sitting; Trial contd to 2/1/79. rh ....

•••

2/1/79 Before WEINSTEIN, J.—Case called. Trial resumes; pltff rests; Trial contd to 2/2/79 at 9:00 a.m. rh ....

2/2/79 Before WEINSTEIN, J.—Case called; Trial resumes; Defts rest; Rebuttal by pltff; Pltff rests; Defts motion for directed verdict denied; Court reviews charge with counsel; Summation by pltff; Summation by deft; Rebuttal summation by pltff; Court charges jury; Jury retires for deliberations at 10:30 a.m.; Defts motion

for mistrial denied; Jury returns at 4 p.m. with a verdict on damages in the amount of $3,300,000; pltffs to submit judgment; pltffs motion for injunctive relief denied; All motions with respect to equitable relief denied; Defts motions reserved for 10 days. rh ....

•••

2/7/79 Trial Brief of Pltff Hydrolevel Corp., filed. mw (207)

2/7/79 Trial Brief of The American Society of Mechanical Engineers, Inc. filed. mw (208)

•••

2/13/79 By WEINSTEIN, J.—Memo and Order dtd 2/13/79 that award of $7,500,000.00 fully compensates pltff and vindicates policy of antitrust laws reflected in trebling provision. Attys fees not warranted, decision limited to particular [sic] fcts and circumstances of case. Judgment greater than $7,500,000 would be excessive. Clerk directed to enter judgment in form of notice of settlement of counter-proposes judgment submitted by deft, filed. jm (211)

•••

2/14/79 By WEINSTEIN, J.—Order dtd 2/9/79 directing to hold judgement until defts motion to set aside case is heard, filed. jm (see 215)

2/14/79 Judgement dtd 2/14/79 pltff Hydrolevel Corp recover of deft American Society Mechanical Engineers sum of $7,500,000.00 with interest from entry date of this judgment at legal rate of 6% per annum w/o attys fees buth [sic] with costs and disbursements as taxed by clerk, filed. jm (216)

•••

2/16/79	Proposed JUDGMENT (unsigned), filed. P.C. sent	mw	(218)
2/27/79	Notice of Motion (RET: 3/8/79 at 9:30 a.m.) of deft for an Order (1) setting aside the verdict and the judgment entered thereon and directing that, notwithstanding the verdict, judgment be entered in favor of deft and against pltff pursuant to Rule 50(b) of the FRCP or, in the alternative (2) granting deft a new trial on the issues of liability and damages pursuant to Rule 59 of FRCivP or, in the alternative, (3) amending the judgment to reduce the amount of damages set forth therein pursuant to Rule 59(e) of the FRCivP filed.	rh	(219)
2/27/79	Deft's Memo of Law in Support of Deft's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, a New Trial filed.	rh	(220)
2/27/79	Deft's Memo of Law in Support of Deft's Motion for an Order Denying a New Trial Conditioned on Pltff's Accepting a Remittitur filed.	rh	(221)
2/27/79	By WEINSTEIN, J.—ORDER dated 2/26/79 that (1) Execution of, and any proceedings to enforce the judgment entered herein on 2/14/79 be and the same hereby are stayed until ten days after the last to occur of (a), etc. (see Order) (2) Deft shall, in lieu of a supersedeas bond, deposit as security cash or securities substantially as set forth upon the attached list marked as Exhibit A hereto; this security shall be held in an escrow or		

	similar account at the Chemical Bank upon such terms as will (a), etc. (see Order) filed together with annexed Exhibit A. rh	(222)
•••		
2/26/79	Before WEINSTEIN, J.— Case called. Deft's motion for judment [sic] notwithstanding verdict, denied; defts motion for remittitur denied.	
•••		
3/28/79	Notice of Appeal filed & mailed to C of A with certified copy of docket sheet. As of 4/3/79. fc	(235)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

• • •

GENERAL DOCKET

• • •

79-7254

DATE	FILINGS—PROCEEDINGS
4/2/79	Copies of notice of appeal and district court docket entries filed on behalf of appellant American Society of Mechanical Engineers, Inc.
•••	
4-10-79	Copy of notice of cross-appeal filed on behalf of Hydrolevel Corp.
•••	
4-30-79	Record on appeal filed (original papers of district court)
5-4-79	Scheduling order #3 filed (parties have agreed that ASME shall be deemed appellant, cross-appellee)
5-16-79	Stipulation for deferred appendix filed
5-17-79	Scheduling order #4 filed
6-5-79	Order substituting Patterson, Belknap, Webb & Tyler for Carter Ledyard & Milburn for appellant ASME
6-5-79	Appellant ASME motion for extension of time to file brief filed 2720 (order endorsed 6-6-79 granting motion)
•••	
9-7-79	Appellant ASME page proof brief filed, pfs. (6cc)

9-13-79 Appellant ASME page proof brief (corrected copy) filed, pfs (6cc)

11/9/79 Appellee Hydrolevel Corp. page proof brief filed, pfs.

11/19/79 Appellee Hydrolevel motion for extension of time to file joint appendix filed, pfs. 901 (*order endorsed 11/19/79: granted*) deferred appendix on or before 12/4/79; appeal ready to be heard the week of 1/7/80)

11/27/79 Appellant ASME page proof reply brief filed, pfs.(6cc)

12/4/79 Appellant ASME deferred joint appendix filed (volumes 1-5), pfs.

12/6/79 Appellant ASME exhibit volume filed, pfs.

12/4/79 Appellee Hydrolevel exhibit volume filed, pfs. (volumes 1-3)

12-17-79 Appellee Hydrolevel motion for leave to file supplemental joint appendix exhibit volume filed 125X (*Order endorsed 12-20-79; granted*)

12-17-79 Appellee Hydrolevel final brief filed

12-18-79 Appellant ASME final brief filed

12-18-79 Appellant ASME final reply brief filed

12-20-79 Appellee Hydrolevel supplemental joint appendix exhibit volume (4cc) filed

3/12/80 Case argued before: Lumbard, Friendly, Meskill, C. JJ.

11/24/80 Judgment affirmed in part; reversed and remanded in part, published opinion, Lumbard, C.J.

11/24/80 Judgment filed.

12/5/80 Appellee Hydrolevel motion for extension of time to file a petition for rehearing filed, pfs. (*order endorsed 12/5/80: granted to 12/15/80*)

12/5/80 Appellant ASME affidavit in support of motion for extension of time to file petition for rehearing filed.

12/5/80 Appellee Hydrolevel itemized and verified bill of costs filed, pfs.

12/15/80 Appellee Hydrolevel petition for rehearing with suggestion for rehearing en banc filed, pfs.

12/15/80 Appellant ASME petition for rehearing with suggestion for rehearing en banc filed, pfs.

1/22/81 Order denying petition of Hydrolevel for rehearing with a suggestion for rehearing en banc filed.

1/22/81 Order denying petition of ASME for rehearing with a suggestion for rehearing en banc filed.

1/29/81 Appellant ASME motion for stay of mandate pending filing of petition for a writ of certiorari filed, pfs. (*order endorsed 2/2/81: granted*)

2/13/81 Appellant ASME motion for clarification of order staying issuance of mandate filed, pfs. (motion for continuance) (*order endorsed* 2/19/81: granted; mandate stayed pending timely filing of a petition for writ of certiorari and until final disposition by the Supreme Court)

5/1/81 Notice of filing of petition for writ of certiorari filed (S.C. #80-1771)

5/4/81 Notice of filing of petition for writ of certiorari filed (S.C. #80-1765)

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF NEW YORK

HYDROLEVEL CORPORATION,
a New York Corporation,

Plaintiff,

—against—

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,
a New York Corporation,

Defendant.

CIVIL ACTION No.
75 C 1360

FIRST AMENDED ANTITRUST COMPLAINT

Jury Trial Demanded

Hydrolevel Corporation, by its attorneys, demanding a trial by jury, brings this civil action against the named defendant and complains and alleges as follows:

JURISDICTION AND VENUE

1. This complaint is filed and the jurisdiction of this Court is invoked in this action instituted against the defendant:

(a) under Sections 4 and 16 of the Clayton Act, as amended, 15 U.S.C. §§ 15 and 26, and 28 U.S.C. § 1337 for violations of:

(i) Section 1 of the Sherman Act, 15 U.S.C. § 1, and

(ii) Section 2 of the Sherman Act, 15 U.S.C. § 2.

(b) under the Court's pendent jurisdictional powers, because the federal and state claims are derived from the same operative facts, and should be tried in a single proceeding, for

(i) violations of Section 340 of the N.Y. Gen. Bus. Law, commonly known as the Donnelly Antitrust Act, New York Consolidated Laws, Chapter 20, Article 22, and

(ii) the plaintiff's claim of trade libel (also described as "injurious falsehood" and "disparagement of property") and tortious interference with commercial relations.

2. Venue exists by virtue of Sections 4 and 12 of the Clayton Act, as amended, 15 U.S.C. §§ 15 and 22, and 28 U.S.C. § 1391(c). The defendant resides, is found, has an agent, transacts business or is doing business within the Eastern District of New York and the unlawful activities complained of herein were carried out, in whole or in part, within this District.

PARTIES

3. Plaintiff Hydrolevel Corporation is a corporation organized and existing under the laws of the State of New York with its principal place of business at 153 Verdi Street, Farmingdale, New York.

4. Defendant The American Society of Mechanical Engineers, Inc. ("ASME") is a non-profit membership corporation organized and existing under the laws of the State of New York with its principal place of business at 345 East 47th Street, New York, New York. Its membership consists mainly of professional mechanical engineers located throughout the United States and in foreign countries.

5. Former defendant International Telephone & Telegraph Corporation ("ITT") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 320 Park Avenue, New York, New York. In December 1971, ITT acquired and merged with McDonnell & Miller, Inc., an Illinois corporation, with the latter becoming the McDonnell & Miller unit of ITT's Fluid Handling Division ("M & M"). M & M was founded in 1924 and, at the time of the acquisition by ITT,

had a manufacturing facility in Chicago employing approximately 200 people and had sales representatives located throughout the United States, as does the M & M unit of ITT today. ITT is a diversified company with subsidiaries and divisions located throughout the United States and the world. In 1974, ITT sales were approximately $5.2 billion. Wherever in this complaint reference is made to defendant ITT, it shall be deemed to include both ITT and M & M, the latter both as an independent corporation prior to merger with ITT, and thereafter as a unit of ITT, unless the context requires otherwise. In 1970, ITT acquired approximately 99 percent of the outstanding stock of the Hartford Fire Insurance Corp., a Connecticut corporation which, as part of its assets, owned, and continues to own, approximately 11 percent of the outstanding common stock of defendant Hartford Steam Boiler Inspection and Insurance Company.

6. Former defendant Hartford Steam Boiler Inspection and Insurance Company ("Hartford Steam") is a corporation organized and existing under the laws of the State of Connecticut with its principal place of business at Hartford Plaza, Hartford, Connecticut. In 1974, Hartford Steam's net premiums were approximately $62 million and its assets were approximately $143 million. It is licensed in all fifty states and the District of Columbia. As alleged in paragraph 5 above, a significant indirect interest in Hartford Steam was acquired by ITT prior to 1971.

DEFINITIONS

7. The term "boiler" means a closed vessel in which water is heated, steam is generated, steam is superheated, or any combination thereof, under pressure or vacuum, for use external to itself, by the direct application of heat. The term "boiler" includes fired units for heating or vaporizing liquids other than water where these units are separate from processing systems and are complete in themselves.

8. The term "pressure vessel" means a vessel in which pressure is obtained from an external source or the application of heat from an indirect source.

9. The term "boiler water level control" includes every type, model, brand and/or category of low water cutoff, water feed regulator, low water cut-off and water feed regulator combination, pump controller, low water cut-off and pump controller combination, electric water feeder, low water cut-off and electric water feeder combination, make-up water feeder and other electrical or mechanical device designed to sense the presence or absence of water at a particular level within a boiler and to maintain such particular level of water. Boiler water level controls may be generally divided into two types, the float-type and the probe-type.

TRADE AND COMMERCE

10. It is estimated that approximately 500,000 boilers of various types and sizes are installed annually throughout the United States. Because of the high pressure and temperatures under which many boilers operate, and because of the potentially serious consequences which can accompany boiler failures (including explosions which can, and have, resulted in loss of life), the ASME, the boiler manufacturing industry, insurance companies, and governmental agencies have together sought to minimize the risk of boiler failure, primarily by setting or adhering to standards for the safe design, construction and operation of boilers.

11. Throughout the United States, the ASME is the leading entity involved in setting standards for safe construction of boilers and pressure vessels. To this end, the ASME has formulated and promulgated its ASME Boiler and Pressure Vessel Code (the "ASME Code"), which sets forth minimum construction requirements, including materials specifications, for the design, fabrication, inspection, and certification of boilers and pressure vessels. This Code has been formally adopted by the ASME, and the ASME's Boiler and Pressure Vessel Committee has the primary responsibility for the fomulation, revision and interpretation of the Code. For many years, the ASME Code has been the accepted industry standard by boiler manufacturers, insurers and users, and governmental bodies throughout the United States. This Code has also been incorporated by reference

into the laws of many states and municipalities. In addition, a number of federal agencies have required compliance with the ASME Code in their regulations and specifications.

12. The ASME Code Symbol Stamp (the "ASME Stamp"), is issued by the Boiler and Pressure Vessel Committee to authorized manufacturers who use it to impress its symbol upon boilers or pressure vessels after they have been inspected to reflect manufacture in accordance with the provisions of the ASME Code. The ASME has granted authority to use the ASME Stamp to a large number of domestic and foreign manufacturers (the largest potential group of customers for boiler water level controls) and because of the widespread acceptance of the ASME Code, continued approval by the ASME through its grant of the ASME Stamp is an absolute necessity for such manufacturers to continue in business. The ASME Stamp affords municipal and state authorities and industrial purchasers quick visual assurance, without the necessity of detailed proof, that a boiler or pressure vessel has been manufactured and inspected in accordance with the requirements of the ASME Code. Many large industrial purchasers designate in their bid specifications that, in addition to meeting the standards of the ASME Code, boilers and pressure vessels bear the mark of the ASME Stamp. As stated above, the ASME Stamp has, over the many years of its use, acquired enormous commercial value and legal significance as a shorthand symbol of quality.

13. Part of the ASME Code requires that on certain types of boilers, constituting a significant portion of the boilers in place and installed yearly, a low water cut-off be installed, and even where not required by the ASME Code, many boiler manufacturers, insurers and users, and government agencies require that a low water cut-off be part of an approved boiler. The ASME Boiler and Pressure Vessel Committee and its Heating Boilers Subcommittee have jurisdiction over Section IV, Heating Boilers, of the ASME Code, which contains provisions relating to low water cut-offs.

14. Manufacturers may not use the ASME Stamp on products that do not meet the standards of the ASME Code, including the low water cut-off provisions of that Code. Under the circumstances, manufacturers are reluctant to install on their boilers low water cut-offs or other boiler water level controls that do not clearly meet ASME Code standards.

15. Boiler inspection and insurance companies conduct periodic inspections of boilers and pressure vessels at the locations where they are installed throughout the United States to ensure that the boilers and pressure vessels meet ASME Code standards. The companies provide insurance coverage for boiler and pressure vessel failures, including coverage for property damage and personal injuries.

16. Hartford Steam is, and has been for many years, the leading insurer of heating boilers, and sells approximately one-third of all such insurance written yearly in the United States.

17. The Boiler and Pressure Vessel Committee of ASME which has jurisdiction over the formulation and interpretation of the Code as well as the issuance of the Stamp to "approved" manufacturers, has been composed of employees of boiler manufacturers, boiler users, public regulatory authorities, insurance and inspection companies, and manufacturers of boiler materials or boiler accessories. An employee of ITT, John James, has served as vice-chairman and chairman of the Heating Boilers Subcommittee of the Boiler and Pressure Vessel Committee during the period covered by this complaint. An employee of Hartford Steam, T. R. Hardin, has served as chairman of the Heating Boilers Subcommittee during the period covered by this complaint. The fact that employees of ITT and Hartford Steam have simultaneously served as officials of ASME has enabled ITT and Hartford Steam to influence decisions of defendant ASME to the detriment of plaintiff, and has intimidated boiler manufacturers into favoring the purchase of ITT-manufactured boiler water level controls over the controls manufactured by the plaintiff.

18. Boiler water level controls are installed as original equipment on many new boilers (the original equipment manufacturer or "OEM" market). Boiler water level controls and components thereof are also installed as replacements or new equipment on boilers and pressure vessels already in use (the replacement market). The total volume of sales of boiler water level controls as original equipment and in the replacement market is approximately $12 million yearly.

19. Since at least 1965, ITT has been the leading firm in the boiler water level control industry accounting for an estimated 85 percent of sales yearly. Until 1974, ITT manufactured and marketed only the float-type boiler water level controls for boiler applications.

20. The marketing of boiler water level controls is done both by boiler water level control manufacturers directly to customers (usually boiler manufacturers for use as original equipment for installation on new boilers, the "OEM" market) and by wholesalers and manufacturers' representatives (both to the OEM market and to plumbing supply houses or others for the replacement market). Most boiler water level controls, including those of plaintiff and ITT, are sold and transported across state lines into states different from the state in which the low water cut-offs are manufactured and also into foreign countries, and the violations alleged herein have had a direct and substantial effect upon this interstate and foreign commerce.

21. Since its incorporation in 1965, plaintiff has been engaged in the development, manufacture and sale in interstate and foreign commerce of probe-type boiler water level controls bearing the trademark "Sensit Safgard" ("Safgard"). Until very recently, ITT, which for many years has had and maintained monopoly power in this industry and has accounted for approximately 85 percent of the sales of boiler water level controls, has manufactured and sold only float-type boiler water level controls. The persistent record of failures of boiler water level controls which have resulted in boiler failures, including boiler explosions, led the principals

of Hydrolevel, Messrs. Russell Rymer and Dominick DeLeonardis, to investigate and develop the unique probe-type Safgard control, portions of which have been patented, and which has been recognized to be a new concept in low water cut-off safety controls. Factory Mutual Engineering Corporation, a leading boiler insurer in the United States, referred to Safgard as a "reliable and fail-safe control," in its publication, *Preventing Low Water Boiler Failures.*

FRAUDULENT CONCEALMENT

22. The acts and practices described herein were inherently selfconcealing and were fraudulently concealed by defendants and their co-conspirators through the use of deceptive practices and techniques which prevented their detection by plaintiff. The plaintiff, with the exercise of due diligence, could not have determined the existence of the unlawful schemes and practices which are the subject of this complaint until March, 1975. Such acts, practices and techniques included but were not limited to the circumstances surrounding the publication of false disparagement of Hydrolevel low water cut-offs by the ASME Boiler and Pressure Vessel Committee on April 29, 1971 and the destruction by ITT of documents and files relating to such publication. Because of a conspiracy to conceal the existence and terms of this publication from plaintiff, it was not made available to plaintiff until 1974. Such acts, practices and techniques also included but were not limited to the dealings between ITT, as the leading company in the boiler water level control industry, and its prospective and existing customers, such dealings including secret inducements to take full requirements from M & M, predatory pricing practices and publications of disparaging and false statements about Hydrolevel products and services to customers, all to the detriment of plaintiff.

OFFENSES

COUNT I

Combination and Conspiracy in Restraint of Trade and to Monopolize

23. Plaintiff here repeats and realleges the averments contained in paragraphs 1 through 22 of this complaint.

24. Various other persons, firms and corporations have participated as co-conspirators with the ASME and the former defendants in the offenses charged in this complaint and have performed acts and made statements in furtherance thereof. These co-conspirators include but are not limited to John James, former Vice President-Research of M & M and former vice-chairman and chairman of the ASME Subcommittee on Heating Boilers, and T. R. Hardin, former Vice President-Engineering of Hartford Steam and predecessor to John James as chairman of the ASME Subcommittee on Heating Boilers.

25. Beginning at a time presently unknown to plaintiff, but as early as 1965, and continuing thereafter to the present, defendant ASME, ITT, Hartford Steam and co-conspirators have engaged in an unlawful combination and conspiracy unreasonably to restrain and to monopolize interstate commerce in boiler water level controls in the United States and in foreign commerce, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Said offense is continuing and will continue unless the relief hereinafter prayed for is granted.

26. ITT has for some time possessed monopoly power in the interstate and foreign boiler water level control markets. Said former defendant presently accounts for approximately 85 percent of annual sales of boiler water level controls in the United States.

27. In effectuation of the combination and conspiracy described above, defendant ASME, ITT, Hartford Steam and co-conspirators deliberately and intentionally engaged in

various acts, behavior and practices, including but not limited to those set forth below:

(a) Defendant ASME has caused and permitted its reputation and power as the industry standard-setter to be perverted and influenced by ITT and Hartford Steam to promote unfairly ITT boiler water level controls and to discourage the development and sale of Hydrolevel boiler water level controls;

(b) The ASME Boiler and Pressure Vessel Committee, as presently constituted and organized, is inherently anticompetitive and therefore constitutes a continuing combination and conspiracy in violation of the antitrust laws;

(c) Defendant ASME has conspired with ITT and Hartford Steam in the unlawful, deliberate acquisition and maintenance of ITT's monopoly power in the boiler water level control industry;

(d) Defendant ASME, ITT, and Hartford Steam have denied plaintiff equal access to and foreclosed it from equal consideration by the ASME, its Boiler and Pressure Vessel Committee and Subcommittee on Heating Boilers, and other ASME committees, subcommittees, and entities;

(e) Defendant ASME, ITT, and Hartford Steam have utilized the power and reputation of ASME in the industry to publish the representation and to otherwise create the impression that the Safgard boiler water level control did not meet the standards embodied in the ASME Code;

(f) Defendant ASME, ITT, and Hartford Steam have induced customers to refrain from purchasing boiler water level controls from plaintiff by (i) publishing disparaging and false statements about the products and services of plaintiff, such publications being accompanied by an intent to cause competitive injury, personal hostility, non-belief in the statements published, and bad faith, and (ii) creating the impression and belief

that the purchase of plaintiff's products by original equipment manufacturers would jeopardize such customers' continued status as an approved holder of the ASME Stamp;

(g) Defendant ASME, ITT and Hartford Steam have purposely induced or otherwise caused third persons not to enter into or continue business relations with plaintiff Hydrolevel Corporation;

(h) ITT has acquired and merged with M & M;

(i) ITT has acquired a significant indirect interest in Hartford Steam;

(j) ITT has utilized its economic power by means of threats and coercion, and by other means, to cause customers to purchase substantially all of their boiler water level control requirements from ITT;

(k) ITT has utilized its economic power by means of announcements of products in advance of their availability to cause customers to refrain from purchasing boiler water level controls from plaintiff;

(l) ITT has utilized its economic power, by means of threats and coercion, and by other means, to cause distributors to refrain from selling boiler water level controls manufactured by plaintiff;

(m) ITT has engaged in predatory pricing of ITT products to induce prospective and existing customers of ITT to purchase ITT's boiler water level controls;

(n) ITT has precluded plaintiff from selling boiler water level controls by means of exclusive dealing arrangements with leading distributors in the boiler water level industry;

(o) ITT has conditioned the sale of one of its products upon the purchase of a separate product or products ("the full line");

(p) Hartford Steam has utilized its power and reputation as the largest insurer of boilers in the United States unfairly to promote and encourage the sale of

ITT boiler water level controls and discourage the sale of Hydrolevel controls by means of agreements with co-defendants to boycott, coerce, and intimidate, and by boycotts, coercion, and intimidation.

COUNT II
Donnelly Antitrust Act

28. Plaintiff here repeats and realleges the averments contained in paragraphs 1 through 22 and 27 of this complaint.

29. Beginning at a time presently unknown to plaintiff, but as early as 1965, and continuing thereafter to the present, defendant ASME, ITT, Hartford Steam and co-conspirators have engaged in a contract, agreement, arrangement and combination whereby a monopoly in the conduct of the boiler water level control business in this state is or may be established and maintained, and whereby competition in the boiler water level control business in this state is, or may be restrained, and whereby for the purposes of establishing and maintaining such monopoly and of unlawfully interfering with the conduct of the boiler water level control business in this state, trade and commerce is, or may be restrained, all in violation of Section 340 of the N.Y. Gen. Bus. Law, commonly known as the Donnelly Antitrust Act, New York Consolidated Laws, Chapter 20, Article 22. Said offense is continuing and will continue unless the relief hereinafter prayed for is granted.

30. In effectuation of the contract, agreement, arrangement and combination described above, defendant ASME, ITT, Hartford Steam, and co-conspirators deliberately and intentionally engaged in various acts, behavior and practices, including but not limited to those set forth above.

COUNT III
Trade Libel

31. Plaintiff here repeats and realleges the averments contained in paragraphs 1 through 22 and 27 of this complaint.

32. Defendant ASME, ITT, and Hartford Steam have engaged in an unlawful combination and conspiracy to cause the publication of untruths disparaging the products and services of plaintiff, such publication being accompanied by an intent to cause competitive injury, personal hostility, nonbelief in the statements published, and bad faith. These untruths were published maliciously and without reasonable or probable cause to believe in the truth thereof. These publications of injurious falsehoods constituted, and continue to constitute, the tort of trade libel (also described as "injurious falsehood" and "disparagement of property").

COUNT IV

Tortious Interference with Commercial Relations

33. Plaintiff here repeats and realleges the averments contained in paragraphs 1 through 22 and 27 of this complaint.

34. Defendant ASME, ITT, and Hartford Steam have engaged in an unlawful combination and conspiracy purposely to induce or otherwise cause third persons not to enter into or continue business relations with plaintiff Hydrolevel Corporation, without privilege to do so, and are liable to Hydrolevel for the harm caused thereby.

INJURY TO PLAINTIFF

35. The unlawful conduct above described has for some time threatened, and continues to threaten, elimination and removal of plaintiff as a competitor in the production and sale of boiler water level controls in interstate and foreign commerce.

36. The unlawful conduct above described has impaired the ability of plaintiff to compete effectively for business in the production and sale of boiler water level controls in interstate and foreign commerce and has impeded the growth of plaintiff in size and profitability.

37. The unlawful conduct above described has caused substantial reductions in the quantity of boiler water level

controls sold by plaintiff and has caused substantial reductions in the level of prices obtained by plaintiff for such boiler water level controls.

38. The unlawful conduct above described has caused, and will continue to cause, plaintiff to be deprived of sales of boiler water level controls, and payment derived therefrom, that could have been obtained in a free and open market, in the absence of the wrongful and monopolistic acts of defendant.

PRAYER

Wherefore, plaintiff Hydrolevel Corporation hereby demands judgment on each and every Count against defendant ASME and prays for:

1. Damages in an amount of at least $2,300,000, to be trebled according to law, for injury to its business and property, together with the costs of suit, including a reasonable attorneys' fees;

2. A permanent injunction prohibiting, enjoining and restraining defendant ASME from continuing the violations of the laws as herein alleged;

3. Compensatory and punitive damages in an amount presently undertermined by reason of malicious publication of injurious falsehoods and tortious interference with commercial relations; and

4. Such other and further relief as the Court may deem just and proper.

s/ HENRY M. LLOYD

Carl W. Schwarz
Henry M. Lloyd
Stephen P. Murphy
Metzger, Shadyac & Schwarz
One Farragut Square South
Washington, D. C. 20006
(202) 347-1631

s/ Donald J. Williamson (H.M.L.)
Donald J. Williamson
Burgoyne, Rose & Bohmart
551 5th Avenue, 35th Floor
Tower Suite
New York, New York 10017
(212) 986-0060

Attorneys for Plaintiff Hydrolevel Corporation

JURY DEMAND

Please Take Notice that plaintiff demands a trial by jury pursuant to Rule 38(b) of the Federal Rules of Civil Procedure of all issues triable of right by a jury.

[Certificate of Service omitted]

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF NEW YORK

HYDROLEVEL CORPORATION, a New York Corporation, *Plaintiff,* —*against*— THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., a New York Corporation, *Defendant.*	75 Civ, 1360 (J.B.W.) AMENDED ANSWER TO "FIRST AMENDED ANTITRUST COMPLAINT"

Defendant The American Society of Mechanical Engineers ("ASME") by its attorneys Carter, Ledyard & Milburn, for its answer to the "First Amended Antitrust Complaint," upon information and belief—

1. Admits that jurisdiction is sought to be lodged in this Court by the allegations of statutory provisions in paragraph 1(a) of the complaint, but denies that the Court has proper pendent or other jurisdiction over the matters alleged in paragraph 1(b) of the complaint.

2. Denies the allegations contained in paragraph 2 of the complaint.

3. Lacks knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraph 3 of the complaint.

4. Admits the allegations contained in paragraph 4 of the complaint.

5. Lacks knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraph 5 of the complaint.

6. Lacks knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraph 6 of the complaint.

7, 8 and 9. Subject to possible engineering or other differences, accepts for the purposes of this case the definitions contained in paragraphs 7, 8 and 9 of the complaint, except lacks knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in the final sentence of paragraph 9 of the complaint and denies that such definitions, or any of them, establish or define any relevant market or sub-market for the purposes of this case.

10 and 11. Lacks knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraphs 10 and 11 of the complaint, except admits that because of the serious consequences which can accompany boiler failures, including explosions and loss of life, ASME has formulated and promulgated the ASME Boiler and Pressure Vessel Code (the "Code") for safe construction of boilers and pressure vessels, which contains certain minimum requirements relating to the construction and use of boilers and pressure vessels, and that the Boiler and Pressure Vessel Committee has the primary responsibility for the Code's formulation, revision and interpretation.

12. Denies the allegations contained in paragraph 12 of the complaint and alleges that ASME issues its Code Symbol Stamp (the "Stamp") to authorized manufacturers who impress its Symbol upon boilers or pressure vessels to reflect manufacture in accordance with the provisions of the ASME Code; alleges that the inspection of boilers is not performed by ASME but is performed by inspectors licensed by a State or Province and, in some cases, by the National Board of Boiler and Pressure Vessel Inspectors and who are employed by a State or Province or by an insurance company; admits that ASME has issued the Stamp to domestic and foreign manufacturers of boilers and pressure vessels; and (subject to possible occasions of misuse of the Stamp) admits the allegations contained in the third, fourth and fifth sentences of paragraph 12 of the complaint except denies that the presence of the Stamp on a boiler demonstrates inspection; lacks knowledge or information with respect to the accuracy of the adverbs and adjectives contained therein, and alleges

that compliance with the Code is frequently specified in the laws of the states and other jurisdictions as one means of meeting required safety standards.

13. Lacks knowledge or information with respect to the accuracy of the adverbs and adjectives contained therein, but otherwise admits the allegations contained in paragraph 13 of the complaint.

14. Denies the allegations contained in paragraph 14 of the complaint except alleges that low water cut-off devices are required by the Code but that no particular design or construction is specified.

15. Admits the allegations contained in paragraph 15 of the complaint except denies that such inspections are to insure compliance with the ASME Code (which governs construction rather than operation and maintenance) and alleges that the inspections are to insure that the operation and maintenance of the boilers and pressure vessels meet the law and regulations of the jurisdictions in which they are located, and to insure that the boilers and pressure vessels remain insurable.

16. Lacks knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraph 16 of the complaint.

17. Denies the allegations contained in paragraph 17 of the complaint except admits that the Boiler and Pressure Vessel Committee of ASME has been composed of persons who (while they do not represent particular companies or organizations in the course of their Code Committee activities) have recognized background and experience in such categories as manufacturers, users of the products for which codes are formulated, manufacturers of material or accessories, regulatory authorities, insurance inspection, and others of general background such as educators or consulting engineers; admits that in April 1971 Mr. T. R. Hardin (who, when not engaged in his ASME activities, was Executive Vice President of Hartford Steam) was Chairman of the Heating Boilers Subcommittee and that in March 1972 Mr. John James (who, when not engaged in his ASME activities,

was Vice President of research for, or a consultant to, McDonnell & Miller division of ITT) was Vice Chairman of the Heating Boilers Subcommittee.

18. Lacks knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraph 18 of the complaint.

19, 20 and 21. Lacks knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraphs 19, 20 and 21 of the complaint, except denies the last clause of the last sentence of paragraph 20 and denies any violations by ASME.

22. Denies the allegations contained in paragraph 22 of the complaint.

23. Repeats its responses to the allegations contained in paragraphs 1 through 22 of the complaint.

24 and 25. Denies the allegations contained in paragraphs 24 and 25 of the complaint.

26. Lacks knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraph 26 of the complaint.

27. Denies the allegations contained in paragraph 27 of the complaint.

28. Repeats its responses to the allegations contained in paragraphs 1 through 22 and 27 of the complaint.

29 and 30. Denies the allegations contained in paragraphs 29 and 30 of the complaint.

31. Repeats its responses to the allegations contained in paragraphs 1 through 22 and 27 of the complaint.

32. Denies the allegations contained in paragraph 32 of the complaint.

33. Repeats its responses to the allegations contained in paragraphs 1 through 22 and 27 of the complaint.

34. through 38. Denies the allegations contained in paragraphs 34 through 38 of the complaint.

FOR A FIRST AFFIRMATIVE DEFENSE

The complaint fails to set forth facts sufficient to state a claim upon which relief can be granted as against this defendant.

FOR A SECOND AFFIRMATIVE DEFENSE

By reason of the provisions of Section 215 of the New York Civil Practice Law and Rules, any claim based upon any publication by this defendant is barred.

FOR A THIRD AFFIRMATIVE DEFENSE

The alleged claims for violations of the New York State Anti-Monopoly Law (the "Donnelly Act") are barred by the applicable statute of limitations, Section 340, N. Y. Gen. Bus. Law, subd. 5.

FOR A FOURTH AFFIRMATIVE DEFENSE

This Court lacks jurisdiction over all alleged claims other than those for violations of the federal antitrust laws.

FOR A FIFTH AFFIRMATIVE DEFENSE

The alleged claims for violations of the federal antitrust laws are barred by the applicable statute of limitations, 15 U.S.C. § 15b.

FOR A SIXTH AFFIRMATIVE DEFENSE

A. In its letter dated April 29, 1971 identified in plaintiff's answers dated December 9, 1975 to ASME's interrogatories (a true copy of which letter is annexed hereto as Exhibit A) ASME responded to an inquiry from one of its members concerning the proper interpretation of a portion of the ASME Heating Boilers Code relating to the operation of low water fuel cut-offs.

A.1. A low water fuel cut-off is a safety device, not an operating control.

A.2. It is the intent of the relevant paragraph of the ASME Heating Boilers Code that a low water fuel cut-off operate immediately and positively when the boiler water

level falls to the lowest visible part of a properly-positioned water gauge glass.

A.3. There are many designs of heating boilers.

A.4. If a time-delay feature is incorporated in a low water fuel cut-off, it is possible, depending upon the method of installation of the low water fuel cut-off and the design of the boiler, that the boiler water level could fall to a dangerous point during the time-delay period.

B. By reason of the foregoing, the statements in the letter dated April 29, 1971 (Exhibit A) are true.

FOR A SEVENTH AFFIRMATIVE DEFENSE

A. The statements contained in the letter of April 29, 1971 (Exhibit A hereto) were made by ASME in response to an apparently legitimate inquiry concerning the proper interpretation of provisions of the ASME Code dealing with the safe construction of boilers and pressure vessels; the statements were made in good faith, without malice, in the belief of the truth thereof, and in furtherance of ASME's legitimate interest in the promulgation of safety standards for boilers.

B. By reason of the foregoing, such statements were privileged.

FOR AN EIGHTH AFFIRMATIVE DEFENSE

The claims asserted in Count IV and in paragraph 27(g) of the complaint have been released and discharged as against ASME by plaintiff's release of such claims as against ITT, an alleged joint tort-feasor.

FOR A NINTH AFFIRMATIVE DEFENSE

A. Upon information and belief, plaintiff has released ITT and Hartford Steam from liability for the claims made in this action, in which ITT and Hartford Steam are alleged to be joint tort-feasors with ASME.

B. Upon information and belief, the consideration received by plaintiff for releasing ITT and Hartford Steam from liability was in the total amount of $800,000.

C. By reason of the foregoing, pursuant to § 15-108 of the New York General Obligations Law, plaintiff's claim against ASME is reduced by $800,000 or by the amount of ITT's and Hartford Steam's equitable shares of any damages suffered by plaintiff, whichever is the greatest.

D. If plaintiff suffered any recoverable damages by reason of any of the matters alleged in ths complaint, ITT and Hartford Steam should equitably bear the whole of such damages.

E. By reason of the foregoing, plaintiff cannot recover damages from ASME in this action.

WHEREFORE, defendant ASME demands dismissal of the complaint, together with its costs and disbursements and such other and further relief as may be proper.

Dated: New York, New York
December 4, 1978.

CARTER, LEDYARD & MILBURN

By s/ LOUIS L. STANTON, JR.
Louis L. Stanton, Jr.
A Member of the Firm

Attorneys for the Defendant
The American Society of
Mechanical Engineers
Office and P. O. Address
2 Wall Street
New York, New York 10005

TO: METZGER, SHADYAC & SCHWARZ
Attorneys for Plaintiff
One Farragut Square South
Washington, D. C. 20006

DONALD J. WILLIAMSON, P. A.
Gateway 1, 26th Floor
Newark, New Jersey 07012

[Exh. A, Hoyt Letter to Mitchell of April 29, 1971, omitted; letter appears at J.A. 64]

[CERTIFICATE OF SERVICE OMITTED]

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF NEW YORK

Trial Court Colloquy with Respect to ASME's Motion for a Directed Verdict at the Close of Plaintiff's Case

[Tr. 436; App. 593*]

MR. STANTON [ASME trial counsel]: The defendant moves under Rule 50, your Honor, for a directed verdict on the grounds that no case has been made on the portion now being tried, that is to say, the issue of conspiracy. Most fundamentally, it seems to us in that issue is that there be an agreement and here, nowhere among the mass of paper, the mass of speeches that we have heared [sic] has there been a bit of evidence that there was an agreement between any of the parties to the alleged conspiracy to do anything to injure the plaintiff.

Failing the essential element of agreement, nothing remains, and there is no reason for allowing the case to continue. We make this submission with respect and with our own knowledge of the proof that we think lurks in the documents which have been marked this morning, most of which are not basically unfamiliar to us. But taken at their highest, taken as a whole at its highest, this evidence rises no higher than to allow the inference that there may have been an agreement—

THE COURT: I don't know about that. If all

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* Pursuant to Court Rule 30.5, the citations in brackets indicate where the printed material which follows may be found in the reporter's transcript of proceedings. "Tr." refers to the page of the official trial transcript where the printed material appears; "App." refers to the page of the Appendix submitted to the Court of Appeals where that page of the trial transcript also may be found.

[Tr. 437; App. 594]

you had was the original issue of the letter, and even a conference, I don't think I would let it go to the jury. After all, you can't have an organization like this held responsible where some businessman wants to use or abuse his position, given the best possible posture to the plaintiff's case.

So even though M & M wanted to use your client as a vehicle for getting some advantage, I don't think that is enough to hold you liable. But once having had the matter brought to its attention and having made clear to permanent employees of rather high rank that a possible injustice has been done it might be thought by the trade to indicate disapproval. It does seems to me that it can be argued that the failure at that point to take reasonable steps, whatever they may be and I am not saying that you didn't do reasonable things, I make no such finding. Without taking reasonable steps to clarify the situation to the trade, it could be considered as an implicit joining of a conspiracy already entered into.

MR. STANTON: Perhaps some of it is abstract, but we have to deal with the evidence here which shows that within two weeks after—that may not be

[Tr. 438; App. 595]

accurate—within five or six weeks after the letter from Mr. Rymer complaining was received, the matter was placed on the agenda for two committees, it was considered by those comittees, the letter was changed to take care of the point that Mr. Rymer raised—

THE COURT: I think you could argue it wasn't changed. A separate letter was issued to Hydrolevel but there was no indication in the Hydrolevel letter that was a modification of the earlier letter. It could be argued that a forthright approach to the problem would have said to Hydrolevel "on such and such a date, in answer to M & M's inquiry we gave the following letter. We have now reconsidered it and we wish to clarify it in order to avoid doing harm to you and the clarification is as follows:"

Then Hydrolevel could have taken that letter and gone out and issued it to the trade. The argument is that you didn't publish it in your magazine or whatever your trade publication is.

MR. STANTON: None of these were published at that time.

THE COURT: I understand. It can be argued that at this point you knew there could be substantial

[Tr. 439; App. 596]

harm done to a company—a small company which was from your point of view an outsider when you had somebody in the inside that was abusing your facilities. It is a very difficult position for a group like yourself to be in. I understand that, because you have all of these engineers who might want to use the group for their own advantage and for that of their company.

I would think if I were deciding the case, I would decide for the defendnt [sic] on what I have heard now and dismiss it on the ground that I wasn't persuaded. That is not my position. I have to decide whether a reasonable juror might possibly be persuaded and I think that is the case.

MR. STANTON: Taking all that your Honor has outlined—

THE COURT: I don't know. Is my analysis faulty? It seems to me that is the heart of the case.

MR. STANTON: With all respect, I think it is. I think it ignores or brushes over the fundamental element of a conspiracy which is to agree to the purpose of somebody who has a purpose. Here there is no purpose on behalf of ASME to injure this plaintiff.

[Tr. 440; App. 597]

None has been demonstrated—

THE COURT: There does not have to be a motive.

MR. STANTON: I am talking about any act which indicates an interest to any program.

THE COURT: They did issue a letter, that is an act. If it is an inadequate letter deliberately designed to be inadequate,

it is clear, or if they failed to act that could be a joining of conspiracy. If I am going to rob a bank and I pay off a policeman or tell my friend or just take a policeman and say, "Turn your back," and he turns his back, that is act or if he doesn't pull out his gun, that is an act. You don't have to take affirmative action in order to join a conspiracy. If your lack of action is designed to aid the conspiracy you are a part of the conspiracy, as I understand the law. I may be wrong.

MR. STANTON: But here there is no evidence that the first letter was designed—that's the evidence that is missing.

THE COURT: But it can be argued, but that it was designed by M & M—

MR. STANTON: On what evidence can it be argued?

[Tr. 441; App. 598]

THE COURT: On the way they used it and the way they got it.

MR. STANTON: The way they got it was to write a letter which came through ASME's normal process, was administered, answered, came back, signed in the usual way—

THE COURT: I understand that.

MR. STANTON:—and out it goes. Where is the complicity of M & M? Where is the bribing of the policeman that you mentioned? Where is anybody asked to turn their back?

THE COURT: Because you see, M & M's personnel is a member of one of your committees.

MR. STANTON: Here we come to the agency point—

THE COURT: You have the argument that the society is protecting its own, that these are all old people who are helping each other. You have the insiders and the outsiders and the insiders are trying to protect each other.

MR. STANTON: If a reasonable juror accepted it, it would be accepted on myth and suspicion. There is no evidence that

there was [sic] insiders or outsiders or anyone protecting the old boys.

[Tr. 442; App. 599]

THE COURT: M & M had a member on the committee, didn't it?

MR. STANTON: Yes, they did. They had a member on the committee—

THE COURT: Apparently the clerk's office or whoever it was on staff knew that and they had dealt with these people. Hydrolevel didn't have anybody on the inside there.

MR. WILLIAMSON [Hydrolevel trial counsel]: May I add one point? This is a point of information. A prima facie case is shown in Exhibit 38, their answers to interrogatories. One of the charts shows—

MR. STANTON: What is that?

MR. WILLIAMSON: This is ASME's answer to our interrogatories and they have a chart section four. It shows that on that subcommittee—the constitution gives express authority and not implicit authority—there has been one member—one user and one that manufactured probes, M & M. 23 years he is on there when he is only supposed to be there for three years. As it shows, one of the abuses shows is to have the dominant member—

THE COURT: That seems to me slight. As a member of the Bar Association Committees, I know

[Tr. 443; App. 600]

that happens. It is a difficult thing. I am cognizant of the problem because the Bar Association could be exactly in this position. It is difficult.

MR. STANTON: In all respect not if you read our brief on agency that we submitted this morning.

THE COURT: You had your staff people who responded. If you didn't have that subsequent series of events, I would say no, but I think it can be argued that the subsequent letter to Hydrolevel was not a forthright addressing of the problem.

Here is a young struggling company who [sic] is in effect steamrolled over because—it can be argued—M & M has contacts within the organization.

MR. STANTON: That's abuse of ASME at the least.

THE COURT: It is abuse of ASME, but having brought the matter to ASME's attention, it can be argued that ASME should have taken forthright action to see that its position was not abused.

MR. STANTON: That raises the more difficult point whether ASME should involve itself in the market matters of which Mr. Rymer complained. Isn't it best, as a matter of public policy, when its function to stick to the technical matters on which

[Tr. 444; App. 601]

the committees dealt in '72—

THE COURT: But if it is going to have people in the industry who are dominant, its got to take precaution to see that it is not abused to keep out newcomers. Public meetings perhaps, people who are dominant can't come on or do sell the product. I don't know what can be done. It is an extremely difficult policy issue. I appreciate the difficulty of your position. If I were trying the case, I would end it now. I am not convinced myself, but that is not the issue for me. The question is whether a reasonable juror would be convinced.

At the least, at the moment, I will let it go forward. Let's see what you come up with. It is not an easy problem.

MR. WILLIAMSON: There is more to it.

MR. STANTON: Your Honor understands that we urge Standard Oil there is no such thing as an unwitting conspirator.

THE COURT: I don't say that you are unwitting.

MR. STANTON: There is no evidence that we were witting.

THE COURT: I don't agree with that. The implication is fairly clear that the matter was

[Tr. 445; App. 602]

brought to your attention and you understood by failure to act that you were going to harm Hydrolevel.

MR. STANTON: You are dealing with a request for publicity—

THE COURT: No, it is the nature of the letter that was sent. It was not a forthright—it could be argued a forthright letter correcting a previous letter that was now being circulated by a competitor.

MR. STANTON: It was the plaintiff who sent it out saying it completely solved the problem.

THE COURT: That is an argument that you could make because the plaintiff is in a position where it is going to have to make that contention. We have to put a good face on. You have to stand up with all due respect and say what a great case you have. You may or may not believe it. I would do the same thing. What we say publically [sic] doesn't mean that we think that is the case.

MR. WILLIAMSON: A regional man in the organization wrote back after the Minneapolis meeting and said that the letter that was sent out was pure bull and they should have put a full page ad in the magazine—

[Tr. 446; App. 603]

THE COURT: Regional man from whom?

MR. WILLIAMSON: The house [sic-Howse] letter which was marked in the sentence [sic-Senate] anti-trust committee proceedings.

MR. STANTON: Is it in evidence?

MR. WILLIAMSON: It is in evidence.

MR. STANTON: Is it in evidence here? If not, I don't think you ought to be referring to it.

THE COURT: If it is in evidence, I am not interested in it.

MR. WILLIAMSON: There is so much here that I can't specifically address it.

THE COURT: You should know what you have.

MR. STANTON: It is hardly our fault.

MR. WILLIAMSON: In any event, your Honor is absolutely correct, they continued to cover up—

THE COURT: It will not help you to overstate my position. I don't think I am absolutely correct. I have doubts about whether I am even correct.

MR. WILLIAMSON: I understand. We all know the burden is whether or not it is the best possible inference. They passed a resolution praising James and he writes the letter—he, James adds his own paragraph to the letter to reinject a doubt.

[Tr. 447; App. 604]

THE COURT: Very difficult problem.

MR. STANTON: I suggest there has been no showing that it is really wrong for James to make an inquiry to ASME for a commercial purpose.

THE COURT: There was nothing wrong with that inquiry as far as your client was concerned. It might have been a part of a nepharious [sic] scheme of his. It comes in in a routine way and it goes out.

MR. STANTON: And our function is to answer those clinically?

THE COURT: Correct.

MR. STANTON: And to continue to do so when a request is raised and not to get involved in the market version? We cannot know what customers were shown.

[Tr. 448; App. 605]

THE COURT: Well, I don't think—

MR. STANTON: It has to be answered in an engineering fashion.

THE COURT: I think it would be unreal to expect that your people didn't know what was happening once Hydrolevel brought it to your attention. That's where the difficulty comes, not the earlier—but the subsequent events and the lack of events.

I'm going to have to let it go forward. I'm sorry.

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IN THE

United States District Court

FOR THE EASTERN DISTRICT OF NEW YORK

TRIAL COURT'S INSTRUCTIONS TO THE JURY
ON THE ISSUE OF LIABILITY

[Tr. 1002; App. 1165]

THE COURT: All right. Good morning, everybody. I hope you—you all look rested and ready for your big examination. I am sure you'll pass. I am going to tell you what the law is and how it applies in the case.

It is your duty as jurors to follow the law as I state it. You are to decide the issues of fact according to this law. I have no view whatsoever as to who should win or who should lose this case, or what witnesses should be believed or what inferences should be drawn.

My sole purpose here is to see that both sides get a scrupulously fair trial and that you decide it according to the law. Is that clear? So if I said anything or did anything or questioned anybody in any

[Tr. 1003; App. 1166]

way, it was only to assist you. Do not give any greater weight to anything I said or did here. What I was doing was according to law as I saw it.

Now, I am going to use the words "burden of proof" in a variety of ways during the course of the case. It is important for you, I think, to assess the evidence with the concept in mind. When we say that a party has the burden of proof, we mean that with respect to that issue or that proposition of fact, that party must convince you that it is more liely [sic] than not that its contentions are true.

If you find that the evidence is eventually [sic] balanced, then the one with the burden of proof must lose on that issue. We do not expect certainty or even near certainty of proof in

a civil litigation. What the law expects is that the probabilities as determined by you from the evidence be in favor of the party who has the burden of proof on the issues.

The plaintiff here has the burden of proof. What I have said is not evidence. What the lawyers have said is not evidence. Do not speculate on why ITT or Hartford Steam or anybody else, individual or institution, is not in the case. You have only one issue before you. Is this defendant liable?

[Tr. 1004; App. 1167]

That's all.

The plaintiff, Hydrolevel, claims that the American Society of Mechanical Engineers entered into a conspiracy with McDonald [sic] and Miller, Hartford Steam Boiler Inspection and Insurance Company, and various boiler manufacturers, in violation of Sections 1 and 2 of the Sherman Anti-Trust Act, and that this caused economic injury to Hydrolevel.

Now, Section 1 of the Sherman Anti-Trust Act provides, quote, "Every contract, combination or conspiracy in restraint of trade or commers [sic] is illegal." And Section 2 provides, quote, "Every person who shall conspire with any other person to monopolize any part of the trade or commers [sic] shall be guilty of a violation of the anti-trust laws."

Of course, for this purpose, a corporation is a person. So the issues on this aspect of the case are, first, has ASME violated the Sherman Anti-Trust Act, either by conspiring to unreasonably restrain trade, or, by conspiring to maintain McDonald [sic] and Miller's alleged monopoly of the boiler water level control industry.

If your answer to question one is no, you should return a verdict in favor of ASME. But if

[Tr. 1005; App. 1168]

your answer is yes, then you have a second issue to determine; namely, has ASME's violation of the antitrust laws been a substantially [sic] or material cause of any injury or damage to the plaintiff's property.

At this stage of the case, we are not considering how much they were damaged, if they were damaged at all. Is that clear? Just whether they were damaged in a substantial way. If your answer to this question is no, you should return a verdict for the ASME. But if your answer is yes, then you should return a verdict in favor of the plaintiff.

Let's take up first the section 1 alleged violations. A conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. So a conspiracy is a kind of partnership in which each member becomes the agent of every other member.

The essence of a conspiracy is a combination or agreement to violate or to disregard the law. Obviously, it does not have to be in the form of an agreement like you would use for buying a house. But there has to be a meeting of the minds and an agreement in a basic sense. You must be satisfied that

[Tr. 1006; App. 1169]

two or more individuals agreed to some action that violated the law, in this case, Section 1 or Section 2 of the Sherman Anti-Trust Act.

If you find that a conspiracy did exist, you must then examine the evidence in this case to determine whether ASME was a part of the conspiracy. If you are not satisfied that there was such a conspiracy, you need go no further. The mere fact that the alleged conspirators associated with each other and may have met together and discussed common interests does not establish proof of the existence of the conspiracy. Evidence of a meeting alone is not sufficient.

In order for you to find that ASME was a member of the alleged conspiracy, you must be satisfied that ASME, by work, deed or conduct, intentionally joined the conspiracy. Mere presence at the scene, whatever the scene is, in this sense here—it is not like a shooting, of course—even coupled with knowledge that wrongful conduct by others is being

engaged in does not support the inference of knowing and intentional attachment to the conspiracy.

Independent, unilateral action on the part of one alleged co-conspirator is also insufficient.

[Tr. 1007; App. 1170]

Plaintiff must show that ASME and the other alleged co-conspirators had a unity of purpose or common design and understanding, or a meeting of the minds in an unlawful arrangement. There must be some evidence that ASME participated in the conspiracy by having a commitment to a common end.

The evidence need not show that the members entered into any express or formal agreement, or that they directly by word spoken or in writing stated between themselves what this object or purpose was, or the details of that purpose, or the means by which the object of the purpose was to be—or the purpose was to be accomplished.

The burden of proof is to show that a conspiracy existed in that the members, in some way or manner, or through some contrivance, positively or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan. A person can become a member of the conspiracy without full knowledge of all the details of the conspiracy and everything that the other co-conspirators were doing. On the other hand, a person who has no knowledge of a conspiracy but who happens to act in a way which furthers some object or purpose of the conspiracy

[Tr. 1008; App. 1171]

does not become a member. He has to want to aid, knowing that there is some activity going on.

Before you may find that ASME has become a member of the conspiracy, a preponderance of the evidence must show that the conspiracy was knowinly [sic] formed and that ASME knowingly participated in the unlawful plan, with the intent to advance or further some object or purpose of the conspiracy. To participate or act knowingly means to act voluntarily, intentionally, and not because of a mistake or

accident or other innocent reason. There must be some consciousness of commitment to a common scheme.

[Tr. 1009; App. 1172]

THE COURT: There is no such thing as an unwitting co-conspirator. In this action, the plaintiff alleges that ASME conspired with McDonnell & Miller, Hartford and others. There has to, obviously, be more than one person involved in order for there to be a conspiracy. It means together with another.

But, of course, all of the people who have been mentioned here need not be members of the conspiracy, as long as there are at least two of them, including ASME. The plaintiff must show that ASME conspired with at least one other co-conspirator.

Hydrolevel and ASME are corporations. They can act only by their officers, agents, servants or employees. Therefore, whenever any mention is made that Hydrolevel or ASME did or did not do something, it means, of course, that the corporation, through its officers, agent, servants or employees, acting within the scope of their employment or authority, and on behalf of and for the benefit of the corporation, were acting or failing to act.

For a corporation to be held responsible for the acts or statements of an act, it is not necessary that the corporation specifically authorize the

[Tr. 1010; App. 1173]

agent to commit the act or make such statements. A corporation is legally bound by the acts and statements done or made within the scope of their express or apparent authority. By express authority is meant that type of authority specifically given to an agent by his superior. By apparent authority is meant that type of authority which outsiders would normally and naturally assume that the agent would have, in the light of his position with the company, and the circumstances surrounding his past conduct with the company or corporation.

Now, the law holds a corporation responsible for the unlawful act of its agents or officers, but only when those unlawful acts are performed within the scope of the authority of the officers and on behalf of the corporation.

There doesn't have to be any gain or even hope of gain by the defendant or its agents in order to find liability. You can act unlawfully to help yourself or your employer, to help another, to hurt another, or for no particular motive. But motive, obviously, or its lack, has a strong evidentiary function, because people usually act for reasons. People or institutions do not usually deliberately

[Tr. 1011; App. 1174]

break the law unless they have a strong reason to do so, and you should consider what the defendant, its staff or its committees seek to gain by violating the law.

Even if one or more of the members of the staff or of a committee or subcommittee of the defendant joined the conspiracy, that would not necessarily constitute a joining by the defendant. For the individual or individuals might be on an escapade or a frolic, as it is sometimes called, although there is nothing funny about what we are talking about, a frolic of his own. They might even be keeping it secret from others, in order to prevent those in authority to scotch the scheme, had they known about it in time.

The participation by staff, officers or committees and subcommittees must have been sufficiently pervasive to make it fair and reasonable to say that they were acting on behalf of the defendant, and that the defendant should be liable for their actions.

The problem is difficult, of course, because a corporation, as I have said, cannot act accept through its agents or employees or its shareholders

[Tr. 1012; App. 1175]

or its Board of Directors or other committees. But most actions and day-to-day decisions of corporations are accomplished by lower level agents.

Here the problem is compounded because unlike most private corporations, which are hierarchial in structure with a chain of command from the president on down, here the structure was apparently diffuse, with many private and public persons doing voluntary work through committees and subcommittees. This structure or the public purpose or the good done by the defendant would not, however, immunize it from liability for violation of the antitrust laws.

If the officers or agents act on behalf of interests adverse to the corporation or acted for their own economic benefit or the benefit of another person or corporation, and this action was not ratified or adopted by the defendant, their misconduct cannot be considered that of the corporation with which they are associated.

Acquiescence, however, with knowledge, or cooperation by the defendant in carrying out a plan or common scheme, can be considered by you, with all of the other evidence, in deciding whether the defendant itself had joined any illegal scheme to

[Tr. 1013; App. 1176]

restrain trade or monopolize.

The evidence must show that the agents were authorized, directly or indirectly, by the corporation, to undertake such actions. Otherwise, the corporation cannot be held responsible for the misconduct of its individual agents.

If you are satisfied that a conspiracy was formed, then you should separately consider whether ASME was, in fact, a member of that conspiracy, and as I have indicated, you should separately examine the acts and conduct of ASME as shown by the evidence. This is important because membership in a conspiracy must be established by evidence of the alleged conspirator's own conduct, his own remarks and statements and other evidence of what he did or said.

To state this in another way, thought [sic] McDonnell & Miller, Hartford Steam and various others are charged with being members of the alleged conspiracy, it is necessary for you to separately consider whether ASME, in accordance

with the evidence and the rules I have outlined, was a member of that conspiracy.

The mere fact that one or more of the other alleged co-conspirators intended to injury [sic] the

[Tr. 1014; App. 1177]

plaintiff in violation of the antitrust laws is not a basis for finding ASME leable [sic], unless you also conclude that ASME was a member of the conspiracy.

Well, that is what I told you at the outset. You are not here to determine whether somebody else did something wrong, but whether this particular defendant did something wrong. But, of course, in considering whether they did something wrong, you will have to consider whether there was an overall conspiracy, in the first place.

The Sherman Antitrust Act does not condemn all combinations or conspiracies which interrupt interstate commerce. It does not apply to restraints as such, but only to those which directly, immediately, and necessarily unreasonably affect commerce among the states or with foreign nations. Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce are not illegal unless they have, or intended to have, an effect on prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition.

The plaintiff, therefore, is not entitled to

[Tr. 1015; App. 1178]

recover merely by showing that the concerted activities of ASME and other alleged co-conspirators restrained interstate commerce in some degree. It must also show that there has been an unreasonable restraint.

Here, the conduct of which the plaintiff complains is that that restraint includes ASME's response to a letter of inquiry concerning a provision of the ASME Code. In determining whether or not an unreasonable restraint exists in this case, you must decide whether the conduct of ASME in this

particular case intended or was unreasonably calculated to prejudice the public interest.

Now, as to the Section II violations, there are four essential elements the plaintiff has to establish to prove that there was a conspiracy to monopolize within the meaning of Section II of the Sherman Antitrust Act.

First, that there was a conspiracy among ASME and the alleged co-conspirators to monopolize an appreciable amount of identificable [sic] interstate or foreign commerce of the United States, which commerce plaintiff claims to be the boiler water level control industry.

Second, that is so, ASME and the alleged

[Tr. 1016; App. 1179]

co-conspirators entered into such conspiracy with the intent to monopolize that commerce.

Third, that one or more of the acts claimed by the plaintiff in its complaint was done; and was in furtherance of such conspiracy to monopolize.

And fourth, that the conspiracy was the proximate cause of damage to the business or property of the plaintiff, by causing it to lose sales on which it would have made a profit.

The plaintiff must establish, that is, prove, has the burden of proof, as I have defined it, that each participant intended to conspire one with the other. That is, that this defendant intended to conspire with at least one of the others I have mentioned.

There has to be some kind of intent to acquire power, to exclude competition. They have to have jointly agreed to carry out a plan or scheme to attain monopoly market power, in some part of interstate trade or commerce.

There has to be an effort to destroy or exclude competition in some part of interstate commerce. The offense requires proof of an attempt to monopolize power in a segment of interstate

[Tr. 1017; App. 1180]

commerce.

In this area, it is, of course, the low water boiler cutoff commerce that they are talking about, essentially, as I understand it.

In deciding the question whether ASME has entered into a conspiracy to monopolize, the word "intent" means more than merely an intention to engage in some act. It means that the plaintiff must prove that ASME intended to injure or destroy competition in this device or in this aspect of the trade. Any particular act that was engaged in by ASME would not be sufficient in and of itself on the issue of a conspiracy, unless you find that the act was done by reason of an intent to injure or destroy competition.

If you find that ASME in its practices was motivated solely by legitimate aims in this particular case we are talking about, and that there was no intent to injure or destroy competition in an appreciable part of interstate commerce, then you would find against the plaintiff on the question of conspiracy to monopolize.

But if you find that they've satisfied you by the burden of proof, as I've defined it, that there

[Tr. 1018; App. 1181]

were substantial acts done in furtherance of that intent, with the adverse effect on the plaintiff, that the plaintiff claims, then you would find in favor of the plaintiff on this second point.

Neither deliberate indifference, recklessness, grossly negligent or stupidity or insensitivity is a substitute for willful joining of the conspiracy. However, the indicia of such states of mind or lack of them may be considered by you in determining whether the defendant joined a conspiracy to assist in the violation of the antitrust laws.

You may also consider in this connection the action or failure to act, when the actions of individual staff or committee members came to wider attention within the defendant. Such subsequent action or failure to act might indicate that a conspiracy had been joined earlier or was being joined when the information became generally known within the

organization and action was or was not taken. Mere coverup to avoid embarrassment would not consitute [sic] joining of a conspiracy, but you may use it as evidence, if, in your opinion, it assists you. There must be an intention to join others to violate the antitrust laws.

[Tr. 1019; App. 1182]

If McDonnell & Miller was violating the antitrust laws and this was known to defendant and it acted deliberately and intentionally to assist M&M in such a violation, it would be guilty of the violation with McDonnell & Miller.

Now, interstate commerce is what is involved in—is what the Sherman Antitrust Act is directed to, but as I understand it, there is no contention here that there is no interstate commerce. So, I won't describe definition of interstate commerce to you. But to restrain interstate trade and commerce means to interfere unreasonably with the ordinary, usual, and freely competitive pricing or distribution system of the open market in that trade. If you find that interstate commerce was unreasonably restrained, the amount of degree of that restraint is not significant.

I have used the term "monopolization". It is a species of restraint of trade. The term does not necessarily mean complete acquisition or control of the market in a particular commodity or the exclusion of all competition. The size of a corporation or the percentage of the market it controls are not by themselves indicative of a

[Tr. 1020; App. 1183]

violation of the antitrust laws.

However, these factors can indicate the degree of power which a corporation has in the competitive market. They can indicate the ability to exercise such power within the relevant market. If there is power to control or dominate such market, to exclude actual or potential competitors therefrom, or to otherwise unreasonably suppress competition in that market, this is sufficient to constitute monopolization under the antitrust laws.

Now, if you determine that ASME was a member of this conspiracy, if there was one, you must determine whether the plaintiff was injured in its business or property by reason of that conspiracy. As I have told you, at this stage, we are not concerned with how much, as long as it was a substantial injury.

There has to be actual economic injury as a result of the conspiracy. Unless there is such injury and ASME was a member of the conspiracy, there cannot be any liability by this defendant.

[Tr. 1021; App. 1184]

THE COURT: (continuing) The plaintiff has the burden of establishing such injury. You must find that there exists a causal connection between the alleged conspiracy and economic injury suffered by plaintiff sufficient for you to conclude that the conspiracy was a material cause or a substantial factor in the occurrence of the economic injury. The mere coincidence of declining business or other economic injury and an activity in violation of the antitrust laws is not sufficient to find a defendant liable, where the other factors, economic recession or general decline in the industry or business problems caused that injury.

In sum, you must find in favor of ASME unless you conclude that the plaintiff has shown not only that there existed a conspiracy in violation of the antitrust laws and that ASME was a member of it, but that the plaintiff has shown that the conspiracy was the actual and substantial cause of injury to the plaintiff. It need not be the only cause or the cause more substantial than any other cause but it has to independently be a substantial cause.

Now, you are going to have to consider

[Tr. 1022; App. 1185]

credibility of witnesses, both those that appeared before you and those who appeared in these depositions. The depositions, as you know by now, are taken with counsel from both sides present. The witness is sworn and there is a reporter like this one taking it all down but there is no judge present,

and you have to consider all of this testimony in the circumstances underwhich each witness has testified and all of the matters which indicate whether he is worthy of belief or not.

Consider the witness' intelligence, motive, state of mind, demeanor and manner as you observed it if there was an appearance here in court. Consider the relation each witness may bear to either side in the case, the manner in which he might be affected by the verdict and the extent to which he has been supported or contradicted by other evidence in the case. The deposition testimony is to be given weight, obviously, by you just as any other evidence in the case should be given weight by you.

There has been some discussion during the trial about an article published in the Wall Street Journal several years after some of the events in the

[Tr. 1023; App. 1186]

case occurred. I have also already instructed you on the point. You are not to read the article itself although apparently there are several copies in the exhibits. If you come across a reproduction which is readable and I don't know whether they are or not, just ignore it and go on to the next page. I have allowed reference to the article for only a limited purpose, only as it relates to the people's reactions to it after it was published. The reaction of a person may show something about how the person feels, and therefore what he or she did on an earlier occasion, but you should consider that reaction to the article in the light of the other evidence that is before you. People could be upset about what is in the newspaper, even though they did not do what the newspaper said they did. In fact, people may be more upset at a false story than at a true story, but you have to consider what you saw and heard here. What is actually said in that article is not relevant on the question of what actually happened, except insofar as I have indicated it explains the reactions of the people here.

The fact that a newspaper says something happened has no bearing or relevance on whether it

[Tr. 1024; App. 1187]

actually happened. There are things in papers that are completely wrong. There are things that are right, but it would be unfair for you to rely on a newspaper article in deciding facts in this case because the author of that article was not here under oath, subject to cross-examination and therefore, her credibility is not of any significance to you. You are the only ones that should decide the case on the evidence actually before you.

There are also some references to exhibits before a hearing in the Senate. I, myself, am not clear from what I have heard about what happened in the Senate but it doesn't make any difference. That again, like the article, has no bearing on the facts before you and do not speculate on what may have been going on in Washington or may not have been going on in Washington.

You have heard some questions about the propriety of actions of John James in suggesting language to be included in the June 9, 1972 letter. You are not here to decide whether Mr. James' actions were personally ethical as far as he was concerned. You are here to decide the question of whether ASME participated in a conspiracy to harm plaintiff's

[Tr. 1025; App. 1188]

business. That is the issue. Forget about why they are not here.

There was reference to the Bonner deposition. Any opinion expressed in Mr. Bonner's deposition as to the validity of this lawsuit or the liability of ASME should be given no weight at all by you. The decision as to liability is solely based on your determination and no one else's. Is that clear? Nobody is interested in what he thought about the suit. He did not know what you know. You are the only people who know all of this. You have to decide this on what is in evidence, not on what other people thought.

The opinions of Mr. Bonner were admitted solely on the issue of what people in the field in this trade might have thought about these letters in interpreting them. You,

however, should use your common sense in weighing the significance of these letters even though you do not have the technical experience and background that other people in the field may have had.

You are the sole triers of the facts in this case. It is your determination and interpretation of the evidence which is controlling. The case so

[Tr. 1026; App. 1189]

far as I can see has been extremely well tried by able and ethical counsel on both sides. They have presented their sides forcibly and well, but the decision is yours alone.

Now, if you find that anybody on the witness stand lied or in the deposition lied, you can ignore their testimony. You should evaluate the expert's testimony the same way as anybody else's. An expert is entitled to give opinions but essentially you are going to have to decide the credibility and weight of the expert's testimony based on qualifications, of course, and experience and interest, but on what you heard and on your common sense evaluation you find the opinion of the expert does not accord with your common sense evaluation in light of your experience, you are entitled to ignore the opinion completely.

Destruction or concealment of relevant documents is evidence which may tend to prove consciousness of guilt and should be considered and weighed by you in connection with all the other evidence, but again, it may not be any evidence of guilt of this defendant, and it is this defendant that we are concerned with here.

[Tr. 1027; App. 1190]

The weight depends upon the motive, as you know. Evaluate it and the surrounding facts and circumstances. If you don't remember any of the testimony and you want it read you can send in a note through the Marshal and I will have the reporter try to obtain it for you. It may take some time.

If you have any question about the applicable law, I will try to help you if I can. Send in a note. Don't discuss the case with anyone outside the jury room. If you have to

communicate you will do it only through the Marshal. Each of you is entitled to your own opinions. I have observed you. You are all intelligent and mature people. You should consider each other's opinions carefully. Listen to each other and then don't hesitate to change your opinion if you are convinced that you are wrong.

Your verdict has to be unanimous; is that clear? The verdict will either be liability or no liability.

Now, as to the two alternates, if there is no objection I am going to excuse them.

MR. WILLIAMSON: No objection.

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[Tr. 1028; App. 1191]

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Now, would counsel like to see me at the sidebar?

(sidebar discussion)

THE COURT: Yes? Plaintiff?

MR. WILLIAMSON: No. The only thing is I saw what you did, that you came back to the point on the credibility of witnesses. So far as I'm concerned

[Tr. 1029, App. 1192]

you covered it.

THE COURT: Yes.

MR. STANTION: Satisfactory to us, your Honor with the exception that we have asked your Honor to charge in the language of Court Exhibit 20 and you have declined to do so.

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Introduced in the
United States District Court
For the Eastern District of New York

[CX 9*]

PLAINTIFF'S REQUESTED JURY CHARGE NO. 28

A corporation, although an artificial being, existing only in contemplation of law, is held to the same measure of liability as an individual and is entitled to the same rights or protection. A corporation acts through its officers, directors and agents and, as such, may conspire with other corporations or with other individuals, as well as individuals may conspire with one another, they may conspire with any other corporation.

A corporation itself, cannot attend a meeting or make decisions; it must act through agents, such as its officers, directors and employees.

In order for a corporation to be responsible for the acts or statements of one of its agents it is not necessary that the corporation specifically authorize the agent to commit the act or make the statement. A corporation is legally bound by the acts and statements of its agents done or made in the name of the corporation and within the scope of their employment, agency or their apparent authority. Acts within the scope of employment are acts done on behalf of a corporation and directly resulted in the performance of the type of duties the employee has general authority to perform.

Apparent authority is the authority which outsiders could reasonably assume that the agent would have, judging from his position with the corporation, the responsibilities previously entrusted to him, and the circumstances surrounding his past conduct.

[* "CX" refers to a Court Exhibit in the trial court.]

Introduced in the
United States District Court
for the Eastern District of New York

[CX 14; AX V. 119-21*]

ASME REQUEST TO CHARGE NO. 4

Liability of ASME for Acts of Its Members

Hydrolevel and ASME in these actions are corporations and can act only by their officers, agents, servants or employees. Therefore, whenever mention is made of Hydrolevel and ASME doing or not doing anything, then of course it means the corporation or any of its officers, agents, servants or employees, acting within the scope of their employment or authority and on behalf of and for the benefit of the corporation.

In order for a corporation to be held responsible for the acts or statements of an agent, it is not necessary that the corporation specifically authorize the agent to commit such acts or make such statements. A corporation is legally bound by the acts and statements done or made within the scope of their express or apparent authority. By express authority is meant that type of authority specifically given to an agent by his superior. By apparent authority is meant that type of authority which outsiders would normally and naturally assume that the agent would have, in light of his position with the company and the circumstances surrounding his past conduct while with the company.

A corporation such as ASME is in law a person, but of course it cannot act otherwise than through its officers and agents. The law, therefore, holds corporations responsible for the unlawful acts of its officers, but only when such unlawful

[* "AX V." refers to the ASME Exhibit Volume submitted to the Court of Appeals, in which the exhibit is reproduced at the pages indicated.]

acts were performed within the scope of the authority of such officers and on behalf of and for the benefit of the corporation. This means that, unless you find that James and the others were acting with an intent to benefit ASME, or that ASME actually benefited from the letters that plaintiff has alleged establish a conspiracy, you cannot find that ASME participated in a conspiracy under the antitrust laws.

Where there is a conflict of interest between the officer or agent and the corporation, the corporation is not liable for the misconduct of the agent. This means that if you find that James and Hardin, although members of ASME committees, were motivated by the desire to benefit M&M, or that this desire to help M&M competitively was in conflict with the interests and purpose of the ASME, then you may not find that ASME has participated in a conspiracy in violation of the antitrust laws.

This rule is based on common sense. If a corporation receives the benefit of the misconduct charged, it is just that the corporation be held responsible for the consequences of that misconduct. On the other hand, the corporation should not be liable where the agents' conduct was undertaken to advance the interests of parties other than the corporation. The motive of the agent must be logically attributable to the corporation. If the officers or agents acted on behalf of interests adverse to the corporation or acted for their own economic benefit or the benefit of another corporation, their misconduct cannot be considered that of the corporation with which they are associated.

The evidence must show that the corporation profited from the officers' or agents' conduct or that the agents were authorized by the corporation to undertake such actions. Otherwise, the corporation cannot be held responsible for the misconduct of the agents.

Introduced in the
United States District Court
for the Eastern District of New York

[PX 38; AX V. 1*]

McDonnell & Miller Inc.

Doing One Thing Well

• • •

3500 North Spaulding Avenue
CHICAGO, ILLINOIS 60618

• • •

April 12, 1971

Mr. W. B. Hoyt, Secretary
ASME Boiler and Pressure Vessel Committee
345 East 47th Street
New York, New York 10017

Subject: Par. HG-605
Section IV Heating Boilers Code

Dear Mr. Hoyt:

Par. HG-605 of Section IV states that each automatically fired steam or vapor-system boiler shall have an automatic low-water fuel cut-off so located as to automatically cut off the fuel supply when the surface of the water falls, to the lowest visible part of the water-gauge glass. Is it the intent of this statement that the cut-off operate immediately when the boiler water level falls to the lowest visible part of the water-gauge glass, or is it permissible to incorporate a time-delay feature in the cut-off so that it will operate after the boiler water level reaches some point below the visible range of the gauge glass?

Very truly yours,

McDONNELL & MILLER, INC.

s/Gene Mitchell
Gene Mitchell

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[* Citations in brackets indicate where the original of an exhibit may be found. "PX" refers to a plaintiff's exhibit in the trial court; "AX V." refers to the ASME Exhibit Volume submitted to the Court of Appeals, where the exhibit is reproduced at the pages indicated. Similarly, "DX" refers to a defendant's trial exhibit and "HX V." to the Hydrolevel Exhibit Volumes in the Court of Appeals.]

Introduced in the
United States District Court
for the Eastern District of New York

[PX 18C at Exh. 5; AX V. 7]

[Stamped:
ASME
Apr. 29, 1971
Boiler Code]

Address Writer Care Of:
Engineering Department
The Hartford Steam Boiler
Inspection and Insurance Company
56 Prospect Street
Hartford, Connecticut 06102

• • •

Subject:

Date:
April 27, 1971

Inquiry from McDonnell & Miller, Inc.
Dated April 12, 1971

Mr. W. B. Hoyt, Secretary
ASME Boiler and Pressure Vessel Committee
345 E. 47th Street
New York, N. Y. 10017

Dear Mr. Hoyt:

I would propose an unofficial reply to the inquirer worded about as follows:

> A low-water fuel cut-off is considered strictly as a safety device and not as some kind of an operating control. Assuming that the water gauge glass is located in accordance with the requirements of Par. HG-602(b), it is the intent of Par. HG-605(a) that the low-water fuel cut-off operate immediately and positively when the boiler water level falls to the lowest visible part of the water gauge glass.
>
> There are many and varied designs of heating boilers. If a time delay feature were incorporated in a low-water fuel cut-off, there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period.

Yours very truly,

s/T. R. Hardin
T. R. Hardin
TRH/hw

[Stamped: ITT No. 002683]

cc: Mr. J. M. Guy
Mr. L. P. Zick

Introduced in the
United States District Court
for the Eastern District of New York

[PX 39; AX V. 10]

The American Society of Mechanical Engineers
United Engineering Center/345 E. 47th St., New York, N.Y.

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THE BOILER AND PRESSURE
VESSEL COMMITTEE

April 29, 1971

•••

Mr. Gene Mitchell
McDonnell & Miller, Inc.
3500 North Spaulding Avenue
Chicago, Illinois 60618

Subject: Section IV Heating Boilers Code - Par. HG-605

Dear Mr. Mitchell:

The inquiry contained in your letter of April 12, 1971, was referred to the Chairman of the concerned Subcommittee who offers the following advice:

A low-water fuel cut-off is considered strictly as a safety device and not as some kind of an operating control. Assuming that the water gage glass is located in accordance with the requirements of Par. HG-602(b), it is the intent of Par. HG-605(a) that the low-water fuel cut-off operate immediately and positively when the boiler water level falls to the lowest visible part of the water gage glass.

There are many and varied designs of heating boilers. If a time delay feature were incorporated in a low-water fuel cut-off, there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period.

Very truly yours,

s/ W.B. Hoyt
W.B. Hoyt
Secretary

•••

Introduced in the
United States District Court
for the Eastern District of New York
[PX 40; AX V. 21; HX V. 754]

Safgard

• • •

HYDROLEVEL CORPORATION
153 Verdi Street,
Farmingdale, New York

• • •

January 25, 1972

Mr. W. B. Hoyt, Secretary The Boiler and Pressure Vessel Committee
The American Society of Mechanical Engineers
United Engineering Center
345 E. 47th St.
New York, NY 10017

Dear Mr. Hoyt:

During a telephone conversation today with Mr. Earl Nobles of Pennco Industries, Inc., he read me a letter under your signature which infers that a time delay in a low water cut-off is unacceptable under the Boiler & Pressure Vessel Code. I was not aware of any such restriction or limitation.

The letter Mr. Noble [sic] made reference to was dated April 29th, 1971, and as it deals with a subject in the public domain, I am certain you will have no objection to furnishing me a copy. As you know we manufacture a product with a time delay, and if it is in conflict with any ASME Boiler & Pressure Vessel Code or Regulation we would be most interested in receiving such information.

Sincerely,

s/ DOMINICK DeLEONARDIS
Dominick DeLeonardis
Vice President

• • •

Introduced in the
United States District Court
for the Eastern District of New York

[PX 41; AX V. 22]

The American Society of Mechanical Engineers
United Engineering Center/345 E. 47th St., New York, N.Y.

February 8, 1972

THE BOILER AND PRESSURE
VESSEL COMMITTEE
• • •

Hydrolevel Corporation
153 Verdi Street
Farmingdale, New York 11735

Attention: Mr. Dominick De Leonardis
Vice President

Subject: Section IV, Heating Boilers, ASME Code—
Par HG-605

Dear Mr. De Leonardis:

As you requested in your letter of January 25, 1972, I am showing below, the April 29, 1971 reply of Mr. Hoyt to an inquirer on time delays of low water cut offs.

> "A low water fuel cut-off is considered strictly as a safety device and not as some kind of an operating control. Assuming that the water gage glass is located in accordance with the requirements of Par. HG-602(b), it is the intent of Par. HG-605(a) that the low water fuel cut-off operate immediately and positively when the boiler water level falls to the lowest visible part of the water gage glass.
>
> "There are many and varied designs of heating boilers. If a time delay feature were incorporated in a low water

fuel cut-off, there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period."

I hope this helps clarify the intent of the subject paragraph.

Very truly yours,

s/ R. D. SUTTON
R. D. Sutton
Assistant Secretary

RDS/sf

Introduced in the
United States District Court
for the Eastern District of New York

[No Exhibit number ... admitted into evidence between PX 41 and 42 at Tr. 64-65 (App. 216-17); AX V. 29-37; HX V. 756-64]

Safgard

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HYDROLEVEL CORPORATION
153 Verdi Street,
Farmingdale, New York

•••

March 23, 1972

Mr. W. B. Hoyt, Secretary
The Boiler & Pressure Vessel Committee
The American Society of Mechanical Engineers
United Engineering Center
345 East 47th Street
New York, NY 10017

RE: ASME Boiler and Pressure Vessel Code;
Heating Boilers; Section IV

Dear Mr. Hoyt:

You will recall that in our letter of January 25, 1972 to you, we asked that you send us a copy of an ASME letter of April 29, 1971 expressing a critical view towards time delays on low water fuel cut-offs. You apparently have chosen to reply through Mr. R. D. Sutton, Assistant Secretary of ASME, for we now have his reply of February 8, 1972. Mr. Sutton failed to send us ASME's letter of April 29, 1971. Instead, he quoted what is obviously only a limited portion of it.

Your and Mr. Sutton's casual and cavalier response to our request of January 25, 1972 is not satisfactory, and I think it appropriate that I emphasize and outline to you in detail our concern about this matter and the conduct of ASME.

For some time we have received reports from various in-

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dustry sources to the effect that ASME was seeking to discourage the use of any low water fuel cut-off having a time delay or snubber action, and that to this end, ASME had expressed the view that such cut-offs were unacceptable under the ASME Boiler and Pressure Vessel Code. We were unable to confirm these reports until early this year, when a representative of Pennco Industries called our attention to your letter of April 29, 1971. Pennco did not feel at liberty to supply us with a copy of your letter, and it was for that reason that we asked you for a copy by our letter of January 25, 1972.

At the time we wrote our letter of January 25, 1972, we were under the impression that your April 29, 1971 letter was addressed to Pennco. We have now learned that that was not the case, and that instead, your letter was apparently intended as a reply to an earlier letter of April 12, 1971 from an unidentified inquirer. We do not know how Pennco came into possession of your letter of April 29th, nor how many other persons have been furnished with the letter, but we do understand that reproduced copies of the letter have been distributed to various potential users of such cut-offs.

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[3]

I must tell you that we view ASME's distribution of your letter of April 29th with great concern for a number of reasons. The first is that your letter is so worded as to indicate that it is the official view of ASME on low water cut-offs with time delays. Certainly, that is the way the industry has construed the letter. That is hardly a surprising construction in view of the fact that the portion of your letter quoted in Mr. Sutton's letter of February 8th, was, we

are informed, stated to be the "opinion" of the Chairman of the Subcommittee for Heating Boilers, Section IV.

The second reason is that your letter ignores and violates ASME's own Code and Rules. Thus, subparagraph HG-602(b) of the ASME Boiler and Pressure Vessel Code (Section IV-Heating Boilers), places the responsibility for establishing the safe operating level of the water line in a steam boiler on the boiler manufacturer, and provides in part that:

> "The lowest visible part of the water gage glass shall be at least 1" above the lowest permissible water level recommended by the boiler manufacturer. With the boiler operating at this lowest permissible water level there shall be no danger of overheating any part of the boiler."

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In turn, subparagraph HG-605(a) of this Code also leaves the location of the low water fuel cut-off device to the discretion and responsibility of the boiler manufacturer, within the limits of subparagraph HG-602(b), providing in part as follows:

> "Each automatically fired steam or vapor system shall have an automatic low water fuel cut-off so located as to automatically cut off the fuel supply when the surface of the water falls to the lowest visible part of the water gage glass."

Finally, nowhere does the Code rule out low water cut-offs having time delays. On the contrary, Subparagraph HG-640(b) of the Code only directs that the manufacturer equip his boilers "with suitable primary (flame safeguard) safety controls, safety limit switches, and burners or electric elements, as required by a nationally recognized standard."

Under these quoted portions of the Code it would be the responsibility of the boiler manufacturer desiring to use a low water fuel cut-off having a time delay to establish such a water level and so to locate the cut-off as to assure compliance with the Code. And if he so placed a low water cut-off having a time delay, the only requirement of the Code is

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that the cut-off conform to a nationally recognized standard. Yet, the clear import of your April 29th letter is that no matter what water level the manufacturer established, and no matter where the cut-off is located, the manufacturer using a time delay cannot comply with the Code! Your letter states:

> "There are many and varied designs of heating boilers. If a time delay feature were incorporated in a low water fuel cut-off, there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period." (Underlining added)

Not only is there no support in the Code for this criticism of time delay low water cut-off expressed in your letter of April 29th, but in expressing that criticism and permitting its circulation as an official position of ASME, you seek, by fiat, to amend the Code. I am sure that the Code, based on the experience and wisdom of many persons, past and present, cannot be so easily amended.

But you do more than merely seek to amend the Code by your letter. You advance a partisan position and thereby ignore the traditional rule of ASME as an impartial developer of safety standards. I would remind you of the fourth paragraph of the Foreward to the Code:

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> "The rules established by the Committee are not to be interpreted as approving, recommending, or endorsing any proprietary or specific design or as limiting in any way the manufacturing freedom to choose any method of design or any form of construction that conforms to Code rules."

My final reason for concern is that the position expressed in your April 29th letter is contrary to the established safety record of low water cut-offs having time delay features. Our company has manufactured and distributed a low water cut-off featuring a time delay for several years, and to this date we are aware of no failures of either our low water cut-offs or boilers on which they have been installed.

Consistent with subparagraph HG-640(b) of the Code, our cut-off with a time delay has been investigated by Underwriters' Laboratory ("UL") which has given its complete approval to it in accordance with UL Standard No. 353. In addition, our same cut-off with a time delay has been approved by Factory Mutual Research Corporation ("FM"), and it is consistent with the requirements of the National Fire Protection Association provisions relating to an interlock system, Sec. 5625 of which provides that "interlock devices shall include

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proper snubbers, time delays, or other means to provide control action consistent with the purposes of this Standard unit causing unnecessary shut-down:" (Underlining added)

Indeed, our control cannot be unknown to the ASME, for ASME's own publications have long carried diagrams of our low water cut-offs, including those having time delays. As evidence of this, I am enclosing a photocopy of our Bulletin 101b, No. 867 Series showing our models LCAF 867, LC 867 TD, and LC 867 E. I think you will agree that the diagrams contained on page 24 of ASME's Recommended Rules for the Care and Operation of Heating Boilers, 1970, Sec. VI, are in fact diagrams for our Safgard cut-offs. Figure 16, depicting an "electrical probe type low water control" clearly is our Safgard control as reflected in the enclosed Bulletin 101b, and the related diagrams clearly are diagrams of our controls from which ASME has eliminated the descriptive numbers. Notwithstanding that you have eliminated the descriptive numbers, it is perfectly apparent that ASME has long recognized controls having time delays.

In short, time delays are nothing new, and they are recognized and approved by responsible rating agencies and they

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have been and are being used by reputable boiler manufacturers. In view of this, I am sure that you can understand our distress at ASME's sudden and cavalier expression that

time delay features incorporated in a low water safety cut-off are not acceptable.

Already your letter has had a serious adverse effect on our company. I do not know that the damage you have done us can be repaired. But, before we consider other action, we believe it appropriate that ASME to be given an opportunity to endeavor to undo that damage. As a minimum, we ask that you now send to all persons who may have received your letter of April 29th, directly or indirectly, a statement correcting the position advanced in that letter. Such a statement, we believe, should make it very clear that low water cut-offs having time delay features are indeed acceptable under the Code. If you have any doubts as to what persons may be gotten access to the indiscriminate dissemination of your letter, then I see no choice but for you to circulate a correcting statement generally among all who might reasonably have become privy to your letter.

Because of the seriousness with which we view this mat-

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ter, I am sending a copy of this letter, as well as copies of our letter of January 25, 1972 to you, Mr. Sutton's unresponsive reply of February 8, 1972, and the other materials enclosed with this letter, to each member of the ASME Subcommittee having jurisdiction over the Code, and to each member of the Boiler and Pressure Vessel Committee.

I trust that in due course I will hear from you with a view towards remedying the damage that has been done by ASME. In any event, I want you to know that Hydrolevel Corporation views this matter with concern and outrage, and is determined to take all necessary steps in order to vindicate our rights.

Very truly yours,

HYDROLEVEL CORPORATION

By s/ RUSSELL S. RYMER
President

cc: Subcommittee Members
Committee Members

Introduced in the
United States District Court
for the Eastern District of New York
[PX 16B at Exh. 25; AX V. 38-39]

The American Society of Mechanical Engineers

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THE BOILER AND PRESSURE
VESSEL COMMITTEE

March 27, 1972

•••

Hydrolevel Corporation
153 Verdi Street
Farmingdale, New York 11735

Attention: The President
Subject: Section IV Par. HG-605

Dear Sir:

Your letter of March 23, 1972 has been received.

I must take strong exception to your intemperate statement that our response of February 8, 1972 to Mr. DeLeonardis inquiry of January 25, 1972 was "casual and cavalier". Furthermore our reply, over Mr. Sutton's signature, contained the entire pertenent [sic] part of our letter of April 29, 1971 which was requested by Mr. DeLeonardis. A copy of that letter is appended hereto with the addressed company name deleted since that does not concern you.

Your letter will be brought to the attention of the concerned subcommittee.

Very truly yours,

W.B. Hoyt
Secretary

/drp

bcc: All members of the Main Committee

attachment: •••
Letter 4-29-71 from Mr. Hoyt

April 29, 1971

Subject: Section IV Heating Boilers Code - Par. HG-605

The inquiry contained in your letter of April 12, 1971, was referred to the Chairman of the concerned Subcommittee who offers the following advice:

A low-water fuel cut-off is considered strictly as a safety device and not as some kind of an operating control. Assuming that the water gauge glass is located in accordance with the requirements of Par. HG-602(b), it is the intent of Par. HG-605(a) that the low-water fuel cut-off operate immediately and positively when the boiler water level falls to the lowest visible part of the water gauge glass.

There are many and varied designs of heating boilers. If a time delay feature were incorporated in a low-water fuel cut-off, there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period.

Very truly yours,

s/ W. B. Hoyt
W. B. Hoyt
Secretary

Introduced in the
United States District Court
for the Eastern District of New York

[DX Y-2; AX V. 40-41]

Subcommittee on Heating Boilers Meeting

May 4, 1972

Name	Affiliation	Category of Interest	Category of Interest re. LWCO
J. W. James, Vice Chairman	McDonnell & Miller Inc.	Mfg. of Mtl. or Acc.	Manufacturer
E. D. Dow, Secretary	The Hartford Steam Boiler	Insurance & Inspection	Insurance & Inspection
M. J. Telesmanic	Commerical Union	Insurance & Inspection	Insurance & Inspection
J. E. Vaughan	General Services Administration	User	User
J. F. Johnston	Johnston Brothers Inc.	Manufacturer	User
G. E. Fratcher	A.O. Smith Corp.	Manufacturer	User
S. F. Harrison	National Board	Regulatory	Regulatory
G. B. Sims, Jr.	United States Coast Guard	Regulatory	Regulatory
R. H. Weigel	Burnham Corp.	Manufacturer	User
J. R. Thomson	Bock Corp.	Manufacturer	User
C. W. Allison	State of Tennessee	Regulatory	Regulatory
T. H. Milton	Heat Timer Corp.	Manufacturer	User
T. J. Corbett	Avco Spencer Div.	Manufacturer	User
R. J. Sharp	Windsor Heating Co.	Manufacturer	User

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[2]

Conference Committee	Affiliation	Location
R. Beckwith	State of Michigan	Lansing, Michigan
J. T. Edson	San Francisco	San Francisco, CA
J. W. Emerson	State of Maine	Augusta, Maine
J. F. Hanley	City of Chicago	Chicago, IL
G. M. Kuetemeyer	City of Milwaukee	Milwaukee, WI
O. R. Kyle	City of Memphis	Memphis, TN
O. W. Lillis	City of Los Angeles	Los Angeles, CA
J. K. Mahr	State of Colorado	Denver, Colorado
H. G. Parker	State of Texas	Austin, Texas
R. E. Peterson	State of Hawaii	Honolulu, Hawaii
S. Schugar	City of Detroit	Detroit, MI
C. C. Shriver	Kansas State	Topeka, Kansas
S. Smith	British Columbia,	Vancouver, BC

Conference Committee	Affiliation	Location
L. E. Stoppleman	City of St. Louis	St. Louis, MO
S. B. Voris	City of Seattle	Seattle, WA
H. B. Wilson	City of Phoenix	Phoenix, AZ

Guests	Affiliation	Location
C. Anderson	Superior Boiler	Hutchinson, Kansas
J. D. Andrew	Uniform Boiler	Hartford, CT
L. Baird	State of Minnesota	St. Cloud, Minnesota
H. Bluhm	State of Minnesota	Cambridge, Minnesota
M. P. Bragg	Hartford Steam Boiler	Hartford, CT
H. M. Canavan	Factory Mutual Research Co.	Norwood, MA
W. Clark	State of Tennessee	Chattanooga, TN
G. Cook	Hartford Steam Boiler	Minneapolis, MN
W. F. DeWolfe	Province of N.B.	Fiton, NB Canada
A. Duncan	A.O. Smith	Kankakee, IL
K. Fields	State of Michigan	Lansing, MI
C. Gramstad	Hartford Steam Boiler	Cleveland, OH
L. R. Happ	Trane Company	LaCrosse, WI
J. B. Kensey	Trane Co.	LaCrosse, WI
W. H. Lauridson	Vapor Corp.	Chicago, IL
H. Long	Hartford Steam Boiler	Minneapolis, MN
F. Ludwig	Western National	Minneapolis, MN
D. Lyon	Air Force	Anchorage, AK
L. Mackedanz	State of Minneapolis	Minneapolis, MN
S. W. May	Industrial Boiler Co.	Thomasville, GA
R. Ostrem	Wisconsin	Madison, WI
R. C. Paridy	Hartford Steam Boiler	Philadelphia, PA
J. Parrir	State of Tennessee	Chattagnooga, TN
C. M. Pickett	Hartford Steam Boiler	Baltimore, MD
J. W. Platt	McDonnell & Miller	Chicago, IL
J. R. Reed	Hartford Steam Boiler	Minneapolis, MN
H. E. Schmidtke	Hartford Steam Boiler	Minneapolis, MN
A. H. Schultz	State of Minneapolis Boiler Div.	Minneapolis, MN
B. Searles	Union Carbide Nuclear Div.	Oak Ridge, TN
B. G. Stunkam	Hartford Steam Boiler	Minneapolis, MN
F. X. White	Insurance Services Office	New York, NY
S. E. White	Hartford Steam Boiler	Chicago, IL
J. Woodworth	Hydronics Institute	Berkeley Heights, NJ
L. W. Yoder	Babcock & Wilcox	Barberton, OH

Introduced in the
United States District Court
for the Eastern District of New York

[DX Y-1; AX V. 42-45]

ATTENDANCE

Boiler and Pressure Vessel Committee Meeting

May 5, 1972

Present: Main Committee	Affiliation	Category of Interest	Category of Interest re LWCO
L. P. Zick, Chairman	Chicago Bridge & Iron	Manufacturer	User
W. L. Harding, Vice Chairman	Combustion Engineering	Manufacturer	User
B. W. Bace	American Oil Corp.	User	User
R. J. Bosnak	U. S. Coast Guard	Regulatory	Regulatory
P. M. Brister	Babcock & Wilcox	Manufacturer	User
H. M. Canavan	Factory Mutual	Insp. & Ins.	Insp. & Ins.
R. J. Cepluch	Combustion Engineering	Manufacturer	User
J. S. Clarke	Esso Research & Engrg	User	User
W. E. Cooper	Teledyne Materials	General Interest	General Interest
W. D. Doty	U. S. Steel	Mfg. of Mtl. or Acc.	User
G. E. Fratcher	A. O. Smith Corp.	Manufacturer	User
G. B. Grable	Bechtel Corp.	General Interest	User
R. C. Griffin	Sun Oil Corp.	User	User
S. F. Harrison	The National Board	Regulatory	Regulatory
J. W. James	McDonnell & Miller Inc.	Mfg. of Mtl or Acc.	Manufacturer
E. M. Kloeblen	Union Carbide Corp.	User	User
B. F. Langer	Westinghouse	Manufacturer	User
J. R. MacKay	Dominion Bridge	Manufacturer	User
R. H. Moeller	Huntington Alloys	Mfg. of Mtl or Acc.	User
M. S. Nehls	C. F. Braun	General Interest	User
J. L. Sullivan	State of New Jersey	Regulatory	Regulatory
C. J. Veith	DuPont	User	User
F. S. G. Williams	Taylor Forge	Mfg. of Mtl. or Acc.	User
W. B. Hoyt	ASME	Staff	Staff
S. W. Reynolds	ASME	Staff	Staff
W. J. Woollacott	ASME	Staff	Staff

Present:

Conference Committee	Affiliation	Category of Interest	Category of Int re LWCO
C. W. Allison	State of Tennessee	Regulatory	Regulatory
R. V. Curry	Province of Saskatchewan	Regulatory	Regulatory
R. Beckwith	State of Michigan	Regulatory	Regulatory
A. J. R. Rees	Province of Alberta	Regulatory	Regulatory
E. Schoenfeld	American Bureau of Ships	Insp. & Rating	Insp. & Ratin
D. R. Bartosch	State of Oregon	Regulatory	Regulatory
W. F. DeWolfe	Province of New Brunswick	Regulatory	Regulatory
D. R. Gallup	State of Illinois	Regulatory	Regulatory
J. R. Hanley	City of Chicago	Regulatory	Regulatory
O. W. Lillis	City of Los Angeles	Regulatory	Regulatory
L. A. O'Morrow	Province of Manitoba	Regulatory	Regulatory
E. A. Peterman	Commonwealth of Pennsylvania	Regulatory	Regulatory
R. E. Peterson	State of Hawaii	Regulatory	Regulatory
S. Smith	Province of British Columbia	Regulatory	Regulatory
L. E. Stoppleman	State of Missouri	Regulatory	Regulatory
J. E. Williams	Province of Prince Edward Island	Regulatory	Regulatory
Director of Codes and Standards			
Melvin R. Green	ASME	Staff	Staff

Subcommittee Members

Present:

Subcommittee on Power Boilers	Affiliation	Category of Interest re LWCO
R. Beckwith	State of Michigan	Regulatory
B.F. Love	Combustion Engineering	User
W. H. Groundwater	Bechtel Corp.	User
J. F. Johnston	Johnston Brothers, Inc.	User
Subcommittee on Nuclear Power		
F. W. Catudal	Travelers Insurance Co.	Insurance & Inspection
L. J. Chockie	General Electric	User
W. R. Gall	Oak Ridge National Lab.	Research
H. F. Jackson	Oak Ridge National Lab.	Research
R. F. Reedy	Chicago Bridge & Iron	User
D. W. Sher	Combustion Engineering	User
W. R. Smith, Sr.	Bechtel Corp.	User
Subcommittee on Heating Boilers		
B. H. Clark	Union Carbide	User
Subcommittee on Pressure Vessels		
R. D. Bonner	Standards Oil Corp.	User
R. A. Ecoff, Jr.	Nooter Corp.	User
J. R. Farr	Babcock & Wilcox	User
J. H. Faupel	E. I. DuPont Corp.	User
R. M. Gibson	Factory Mutual Insurance	Insurance—Inspection
J. LeCoff	Catalytic Construction	User
W. R. Mikesell	Chicago Bridge & Iron	User
A. J. R. Rees	Province of Alberta	Regulatory
E. Schoenfeld	American Bureau of Ships	Inspection & Rating
J. J. Szigety	Foster Wheeler Corp.	User
Subcommittee on Code Symbol Stamps		
W. J. Stuber	Royal Globe Insurance Co.	Insurance & Inspection
Honorary		
J. D. Andrews, Jr.	Uniform Boiler & Pressure Vessel Laws Society	Regulatory
National Board		
D. R. Bartosch	State of Oregon	Regulatory
J. G. Gillissie	National Board Consultant	Regulatory
L. J. Hutchinson	National Board Consultant	Regulatory

F. R. Abernathy	Tennessee Eastman Co.	Kingsport, Tenn.
W. J. Beuler	Graham mfg. Company	Batavia, New York
J. O. Brown	C-E Natco	Tulsa, Okla.
D. Christofferson	Chicago Bridge & Iron	Oakbrook, Ill.
J. E. Dawson	Hercules Inc.	Wilmington, Del.
A. W. Diamond	Dept. of Labor	NFLD Canada
P. Dimitriff	AELL-Power Projects	Sheridan Park, Ontario
A. Duncan	A. O. Smith Corp.	Kankakee, Ill.
T. Duncan	Gaston County Dyeing	Charlotte, N.C.
J. F. Edson	City & County of S. F.	San Francisco, Calif.
J. R. Farr	Babcock & Wilcox	Barberton, Ohio
K. Field	State of Michigan	Lansing, Mich.
C. Gramstad	Hartford Insurance	Cleveland, Ohio
J. J. Hack	Hartford Steam Boiler	Hartford, Conn.
C. H. Harmsen	Northern States Power	Mick, Min.
J. E. Hartin	Continental Inspection	Toronto, Ontario
M. J. Houle	Trane Co.	LaCrosse, Wis.
J. J. Kane	Inspeccions y Peritajes	Mexico, D. F.
J. B. Kansey	Trane Co.	LaCrosse, Wis.
E. L. Kemmler	Hartford Steam Boiler	Hartford, Conn.
W. H. Lauridsen	Vapor Corp.	Chicago, Ill.
C. W. Lawton	C-E Natco	Windsor, Conn.
D. Lyon	U. S. Air Force	Anchorage, Ark.
T. J. Macaulay	Buckeye Fabricating Co.	Dayton, Ohio
J. K. Mahr	State of Colorado	Denver, Col.
R. E. Marowity	Brighton Corp.	Cincinnati, Ohio
R. J. Meyer	Nooter Corp.	St. Louis Mo.
L. P. Nicklep	3M Co.	St. Paul, Minn.
J. Nowak	Rheem-Acme Ind.	Jackson, Miss.
R. C. Paridy	Hartford Steam Boiler	Phila., Pa.
C. M. Pickett	Hartford Steam Boiler	Baltimore, Md.
J. W. Platt	McDonnell & Miller Inc.	Cleveland, Ohio
H. C. Rasmenpair	Struthers Wells	Warrior, Pa.
G. S. Reddy	John Blue Company	Huntsville, Ala.
V. Saliamonas	General Electric	San Jose, Calif.
H. E. Schmidt	Hartford Steam Boiler	Hartford, Conn.
N. G. Schreiner	Consultant	Phila., Pa.
S. Schugar	City of Detroit	Detroit, Mich.
E. W. Shilling	DuPont Co.	Wilmington, Del.
R. B. Smith, Jr.	Hercules Inc.	Wilmington, Del.
K. E. Stockton	C-E Natco	Tulsa, Okla.
W. H. Templeton	Continental Insurance	Toronto, Ontario
M. E. Thompson	Hartford Insurance	Cleveland, Ohio
J. R. Vasques	B & N Mexico	Mexico, D. F.
S. B. Voris	City of Seattle	Seattle, Washington
R. I. Walker	Hartford Steam Boiler	Minneapolis, Minn.
F. X. White	Insurance Service Office	New York, New York
C. M. Williamson	Will Flow Company	Belding, Mich.
H. B. Wilson	City of Phoenix	Phoenix, Arizona
L. Wood	Black Sivalls & Bryson	Tulsa, Okla.
L. Yoder	Babcock & Wilcox	Barberton, Ohio
P. R. Young	Rye Hanvon Spg.	Los Angeles, Calif.

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[PX 16B at Exh. 28; HX V. 264-65]

(Condensed abstract of taped discussion at M/C meeting May 5, 1972. [Handwritten at bottom of first typed page].)

Section IV Reply of Mr. T. R. Hardin
Hydrolevel Corp. Letter Dated March 23
Mr. J.W. James (speaker)

All members of the Main Committee received a copy of this letter with several enclosures. The intent of the letter was to criticize the response in an unofficial reply which was prepared by Mr. T. R. Hardin who has retired from his business and ASME Committee activity.

This matter was reviewed publicly and completely at the Heating Boiler Subcommittee Meeting yesterday afternoon with Mr. S. F. Harrison in the Chair. The committee after full discussion decided and voted unamimously to reconfirm Mr. Hardin's unofficial reply involving only the first paragraph. There were two paragraphs.

The intent of that action was to reconfirm the unofficial reply for the Main Committee to consider an official reply. The intent of Mr. Hardin letter [sic] was to emphasize and re-emphasize that any low water cut off device installed on a heating boiler would operate immediately and positively when the boiler water level falls to the lowest visible part of the water gauge glass.

The part that wasn't reconfirmed read this way:

There are many and vary [sic] designs of heating boilers. If a time delay feature were incorporated in a low water fuel cut-off there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period.

[2]

Mr. Hardin unofficially implied that a time delay might not be desirable. The action of the Heating Boiler Committee in the First Paragraph of Mr. Hardin's letter allows any device to be used in conjunction with a low water cut off with the understanding that it be positioned in such a way that when all the automatic features at function including a time delay that the burner would be cut off immediately and positively when the boiler water level falls to the lowest of part of the water gauge glass. [sic]

So what the Heating Boiler Subcommittee did yesterday was to say, you can use a time delay.

Zick: The answers are prepared by secretaries with the help of the of the [sic] Chairman and this reference of Mr. Hardin reply [sic] was actually a reply from our staff which is always the case.

It is the opinion of the Chairman that this committee should endorse the actions of Subcommittee IV if they see fit, since everyone received a copy, as an official reply.

"A low water fuel cut-off is considered strictly as a safety device and not as some kind of operating control. Assuming that the water gauge glass is located in accordance with the requirements of paragraph HG-602(b) it is the intent of paragraph HG-605(a) that the low water fuel cut-off operate immediately and positively when the water level falls to the lowest visible part of the water gauge glass.

Mr. R. J. Cepluch: "If I were the man receiving that I would read it as prohibiting my device. This device would not be prohibited under the Code, provided it was so located that it did shut the burner before it reached the lower level."

Voted: Messrs. Harrison and Dow will prepare letter to go into the minutes.

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[PX 45; AX V. 77]

The American Society of Mechanical Engineers
United Engineering Center/345 E. 47th St., New York, N.Y.

BOILER AND PRESSURE VESSEL COMMITTEE

June 9, 1972

Hydrolevel Corporation
153 Verdi Street
Farmingdale, N.Y. 11735

Attention: Mr. Russell S. Rymer, President

Subject: Section IV, Heating Boilers-Par HG-605
Your Letter of March 23, 1972

File: BC 72-99

Gentlemen:

As indicated in our letter of March 27, 1972, your letter of March 23, 1972 was considered by the applicable Committees at their meeting held on May 4 and 5, 1972.

The Committee confirmed the intent of our letter to the attention of Mr. D. DeLeonardis of February 8, 1972.

This will advise that there is no intent in Section IV to prohibit the use of low water fuel cutoffs having time delays in order to meet the requirements of Par. HG-605 (a). This paragraph relates itself to Par. HG-602 (b) which specifically delineates the location of the lowest visible part of the water gage glass.

If a means for retarding control action is incorporated in a low-water fuel cutoff, the termination of the retard function must operate to cutoff the fuel supply before the boiler water level falls below the visible part of the water gage glass.

Very truly yours,

W. B. Hoyt
Secretary

drp/

bcc: W. L. Harding
S. F. Harrison
J. W. James
L. P. Zick

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[PX 3, Exh. 1; HX V. 61-62]

CONFIDENTIAL

ITT

International Telephone
and Telegraph Corporation

McDonnell & Miller

3500 N. Spaulding Avenue
Chicago, Illinois 60618
(312) 267-1600

Date November 14, 1973

From: W. E. Brennan

To: R. R. Kubis

Subject: Recommendation on J. W. James

Attachments:

"Personal Record"

Recommendation:

That J. W. James be retained by McDonnell & Miller on site as a regular employee if possible, or on a contract basis otherwise. Details of salary and conditions to be negotiated. His basic work content to be similiar to his present, with these three primary duties listed in priority:

1. Maintain his status and influence in professional and code making bodies for the benefit of M & M, including handling product submittals to inspection bodies.

2. Provide technical support to all M & M functions where appropriate and provide direct back-up in the product liability area.

3. Perform the direct supervisory function in the customer correspondence section.

Reason for the recommendation:

John has been a senior management employee of M & M for over 25 years. His professional and academic credentials are outstanding. A major reason for the continued success at M & M is a result of his efforts and skill in influencing the various code making bodies to "legislate" in favor of M & M products. This has been a planned strategy for the business under E. N. McDonnell and carried out with considerable success as evidenced by the M & M market penetration of 70 plus %.

John has considerable professional stature in the controls field and is widely known both in the United States and in Europe. In addition to the impressive "personal record" attached, below are some of his current activities that should be emphasized:

ASME

1. Member of main boiler and pressure code committee.

2. Member of executive committee of the main committee.

3. Chairman of the heating boiler sub-committee (section 4).

4. Member of safety valve sub-committee.

American Society of Heating and Air Conditioning Engineers—presidential member (national president in 1956)

• • •

[2]

A detailed list of John's accomplishments at M & M has not been made, but I am sure it would be most impressive.

It is of vital importance to M & M to maintain the continuity of John's influence as above. He has a contribution to make and is both willing and able to make it. John is 67 year old, his health is excellent and his mental abilities show no deterioration. In this circumstance his seniority is a distinct plus for both experience and influence.

I need John W. James in the position discribed [sic] in the recommendation in order to continue the high level of financial performance of M & M and ask that you allow me to fulfill that need without delay. In addition to this direct need, if ITT fails to maintain John's present status in the various code activities, there is a risk of criticism of ITT from his associates. He is M & M to these people. John's integrity is not at question here. He would under no circumstance do anything to hurt M & M or ITT, in my opinion. However his unplanned or unannounced departure could result in unnecessary industry antagonism. Certainly at some future point a placement for John will be necessary, and was so recognized in the 1973 budget and 1974 business plan (an assistant was planned), but the action must be carefully planned and executed.

Attached are several copies of this letter for your use with Messrs. Stork, Berkshire, Wallisky, as you see fit.

WEB/bw

Introduced in the
United States District Court
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[PX 15 at Exh. 28, HX V. 182-84]

ITT

International Telephone and Telegraph Corporation

McDonnell & Miller

3500 N. Spaulding Ave.
Chicago, Illinois 60618
(312) 267-1600
Telex 25-3376

From: W. E. Brennan

To: E. C. Stork—FHD

Subject: Response to Wall Street Journal

Date June 12, 1974

Attached is a copy of John W. James' letter to Ms. Priscilla Meyer of the Wall Street Journal. This letter resulted from John's visit yesterday with Mr. P. O'Shea and others at New York Headquarters. It has been approved for release by both New York Legal and Public Relations Departments.

Our understanding at McDonnell & Miller is that we are to refer any inquiry from Ms. Meyer or the Wall Street Journal to Mr. Jes E. Schlaikjer in New York.

s/W.E. Brennan
W. E. Brennan

WEB/lp
Attachment
Copies to:

Midwest Legal	New York Headquarters	FHD	M & M
G. Athas	J. C. Clamp	R. J. Berkshire	J. W. James
H. McDonald	P. O'Shea	R. R. Kubis	J. W. Platt
	K. Perkins	E. L. Mitchell	
	J. E. Schlaikjer	J. Vokaty	

McDonnell & Miller
A Unit of International
Telephone and Telegraph
Corporation
3500 N. Spaulding Ave.
Chicago, Illinois 60618
(312) 267-1600
ITT Telex 25-3376

June 12, 1974

Ms. Priscilla Meyer
The Wall Street Journal
22 Cortlandt Street
New York, New York 10007

Dear Ms. Meyer:

I understand from Mr. W. B. Hoyt, Secretary of the ASME Boiler and Pressure Vessel Committee, that you have inquired concerning an interpretation given by Mr. Hardin, then Chairman of the ASME Subcommittee on Heating Boilers, concerning time delay features in a low water cut-off product. I understand that you have a complete file concerning this matter. I would like to point out the following:

1. Numerous requests for interpretation are received by the Committee weekly and such requests are entirely routine;

2. This request was handled in a routine manner and was answered by the Chairman of the Subcommittee;

3. After Hydrolevel complained about the interpretation, the interpretation was submitted to the entire Subcommittee at its May, 1972 meeting. I, as an employee of the only competitor of Hydrolevel, removed myself from the discussion. The Subcommittee is made up of 15 members and is composed of representatives from boiler manufacturers, users such as Illinois Bell Telephone, regulatory bodies such as the Chief Boiler Inspector for Tennessee, insurance companies, and government agencies such as GSA and U.S. Coast Guard.

This Subcommittee advising there was no intent to prohibit low water cut-offs having time delays reaffirmed the prior interpretation by Mr. Hardin, in stating, in a letter of June 9, 1972 by Mr. Hoyt, that "if a means for retarding control action is incorporated in a low water fuel cut-off, the termination of the retard function must operate to cut off the fuel supply before the boiler water level falls below the visible part of the water gauge glass".

***

[2]

4. The top level marketing people of McDonnell & Miller did, in fact, point out the fact to some OEM boiler customers that Hydrolevel's product might not meet the code requirements, depending upon application. We consider this to be fair and honest competition. In fact, if you read Hydrolevel's own literature, it criticizes our product and other float type products in some of their features. We consider pointing out the disadvantages of the competitor's product good and fair competition, particularly where safety features are involved.

5. As you apparently know, it is our understanding that you informed Mr. Hoyt that the FTC has investigated Hydrolevel's complaint and has closed the file on the basis that this dispute is between two companies and it does not involve any violation of the antitrust laws including, I assume, Section 5 of the Federal Trade Commission's Act which prohibits unfair competition.

If you have any further questions, will you please advise us in writing.

Very truly yours,

McDONNELL & MILLER ITT

s/JOHN W. JAMES

By JOHN W. JAMES

JWJ/lp
Attachment

Introduced in the
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[PX 5 at Exh. 8; HX V. 67-68]

COMMITTEE CORRESPONDENCE

Address Writer:

JOHN W. JAMES
2320 GREENWOOD AVE.
WILMETTE, ILLINOIS 60091

Date: August 9, 1974

Wall Street Journal Article
Dated July 9, 1974

Mr. M. R. Green, Managing Director
ASME Research, Codes and Standards
United Engineering Center
345 East 47th Street
New York, New York 10017

Dear Mr. Green:

In accordance with our telephone conversation earlier this week, I have prepared the following statement which may be excerpted for inclusion with the material you intend to present to the ASME Council.

Because the subject article insinuates "close ties between (a) dominate company in an industry and the professional society (ASME) that serves as its watchdog", it seems desirable to review the facts relative to ASME Boiler and Pressure Vessel Committee Procedure for handling routine inquiries.

There will be no attempt in this letter to respond to any of the commercial implications of the subject article many of which are not consistent with the facts.

Paragraph 8.02 in the ASME Committee Procedure outlines a process for handling routine inquiries. When the

April 12, 1971 inquiry from Mr. Gene Mitchell with McDonnell & Miller, Inc. was received, the Secretary of the Committee referred the matter to Mr. T. R. Hardin who was then Chairman of the Subcommittee on Heating Boilers.

There was inference in the Wall Street Journal article that Mr. Mitchell could have obtained an official answer from me instead of writing ASME. This is not true. As a matter of fact, many inquiries sent to the Secretary are received from ASME Main Committee or Subcommittee members who desire an official interpretation from the Committee.

As the ASME files will disclose, Mr. Hardin chose acceptable Committee procedure to personally propose an unofficial response to the inquirer in a letter which he wrote to the Secretary dated April 27, 1971. The Wall Street Journal article implies that I, as then Vice Chairman of the Subcommittee, assisted in preparing the response. This is not true.

•••

[2]

When the unofficial response dated April 29, 1971 was received from the Secretary, it is recognized that top level marketing people of McDonnell & Miller, Inc. did show a copy of the letter to a limited group of boiler manufacturers. This is considered a normal business practice in the marketplace. Instances of similar situations will be found in the files, such as, an inquiry received in 1967 on a related subject (see attached letters dated August 16 and September 21, 1967). In this case, the contents of the official response were made known to interested parties without adverse reaction from the inquirer. Admittedly, I am not acquainted with all practices of displaying inquiry responses, but I believe the contents of the subject matter of such letters are of general public interest.

After Hydrolevel received a copy of the subject matter inquiry response incorporated in a letter from the Secretary dated February 8, 1972, they prepared a letter of criticism which was directed to the Secretary on March 23, 1972 with copies sent to all members of the Subcommittee on Heating Boilers and the Main Committee.

At the Minneapolis May 4, 1972 meeting of the Subcommittee on Heating Boilers, I removed myself as Chairman of

the Committee and did not participate in any discussion of the subject. Upon recommendation of the Subcommittee on Heating Boilers, the Main Committee, at their May 5, 1972 meeting, voted to approve an official communication reply per the attached letter dated June 9, 1972.

In summary, this June 9 letter confirmed the intent of the original inquiry response, with a statement to the effect that there was no intent to prohibit the use of low water fuel cut-offs, having time delays, providing the termination of the retard function operates the cut-off before the water level falls below the visible part of the water gauge glass.

The above review, in my opinion, clearly indicates the subject inquiry was handled in a regular prescribed manner as outlined in the ASME Committee Procedure.

Although the statements in this letter are intended to cover an explanation of facts which may be subject to public scrutiny, I do not wish any of the contents of this letter to be released to the press, because I have no desire to formally respond to the subject Wall Street Journal article.

Very truly yours,

s/JOHN W. JAMES
JOHN W. JAMES

JWJ/lp
cc: Mr. L. P. Zick
Enc: Copies of letters dated—
Aug. 16, 1967, Sept. 21, 1967, June 9, 1972

Introduced in the
United States District Court
for the Eastern District of New York

[PX 5, p. AS-32 and Exh. 13; AX V. 87-90]

The Wall Street Journal, July 9, 1974

Knocking the Competition—
How Rival's Use of "Industry Code"
Report Created Problems for a Tiny Company

By Priscilla S. Meyer

NEW YORK.—For the past three years, Russell Rymer has spent more time defending his product than selling it.

Mr. Rymer is president of Hydrolevel Corp., a Farmingdale, N.Y. company that makes boiler controls—hardly the sort of product likely to fire a simmering controversy. Yet lately, controversy has stalked Mr. Rymer wherever he goes, especially on sales calls.

Just a few weeks ago, for example, he was in the midst of a demonstration when the customer glanced archly at the Hydrolevel control and snapped. "I understand this doesn't meet the industry code."

In Mr. Rymer's business, that's a very serious charge. The code of standards for manufacture and design of boiler controls is set by a professional group, the American Society of Mechanical Engineers. Failure to pass muster with the ASME makes a product virtually unsalable.

Though the ASME confirms that the Hydrolevel control decidedly does meet its standards, rumors to the contrary have circulated within the industry for some time.

Close ties and handicaps

The confusion started as a result of a marketing ploy of a competitor, Chicago-based McDonnell & Miller Inc., which through an intricate series of maneuvers, obtained and circulated a letter from the ASME implying that the Hydrolevel control didn't meet its standards. John W. James, an

engineer and vice president of McDonnell, concedes that company salesmen did point out to boilermaker customers that Hydrolevel's product might not meet code requirements "depending upon application." Mr. James, who also serves as chairman of the ASME committee setting boiler-control standards, adds "We consider this to be fair and honest competition."

Though efforts to knock the competition aren't unusual in obscure and technical markets, the Hydrolevel dispute raises serious questions about the close ties between the dominant company in an industry and the professional society that serves as the watchdog. It also illustrates the mammouth handicap facing an upstart (Hydrolevel's annual sales are $150,000) that chooses to pit itself against a substantial competitor (McDonnell has more than 85% of the annual $10 million boiler market) owned by an even larger company, International Telephone & Telegraph Corp.

The boiler controls responsible for the furor is called a low-water cutoff. For decades McDonnell has made the cutoff that is standard equipment on most boilers: a small device that floats in the boiler water and physically switches off the current when the water level drops too low. Insufficient water causes boiler damage and even explosions.

Hydrolevel's automatic cutoff

Back in the early 1960s', however, engineers who were eventually to become officers of Hydrolevel developed a more expensive electrical cutoff. It can be set to shut off the boiler automatically when the water in a glass measuring gauge reaches a given low level. The Hydrolevel control differs from other electrical cutoffs in that it employs a time-delay feature: About a minute elapses between the time the low-water level is reached and when the boiler is shut off. The reason for the time lag is that the ordinary splashing and surging of water in a steam boiler can sometimes trip the cutoff switch too soon, so that it burns on and off repeatedly as the water approaches the low level.

Early in 1971, at about the time McDonnell began acquisition talks with ITT, Hydrolevel made its first substantial sale—to Brooklyn Union Gas Co. The New York company replaced McDonnell floats on its boilers with Hydrolevel electrical controls. About the same time, the General Services Administration began considering the idea of using dual controls on boilers in government installations. Their idea was to pair McDonnell floats with Hydrolevel's electrical controls to achieve a safer backstop system.

A trail of skepticism

In April of that year, Eugene Mitchell, McDonnell's sales vice president, wrote what appeared to be a routine inquiry to the ASME asking for clarification of its operating code for boiler controls. Of particular interest to Mr. Mitchell was the section of the code stating that a boiler must be immediately shut off when the water level falls to the lowest point on the gauge. He wrote: "Is it permissible to incorporate a time-delay feature in the cut-off so that it will operate after the boiler water level reaches some point below the visible range of the gauge glass?"

What happened afterward was to have a profound affect on Hydrolevel operations. The ASME sent a reply to Mr. Mitchell, stating that if a time-delay feature were used on a fuel cutoff "there would be no positive assurance that the boiler water level wouldn't fall to a dangerous point during a time-delay period." McDonnell salesmen proceeded to show copies of the ASME's reply to their boiler manufacturer customers, thus sowing a trail of skepticism about time-delayed electrical controls. Indeed, many boiler makers interpreted the ASME reply to mean that Hydrolevel control violated its code.

What the McDonnell salesmen apparently didn't point out to their customers was that Hydrolevel's time-delayed control doesn't work the way Mr. Mitchell suggested in his query letter to the ASME. If the company's instructions are followed correctly, the cutoff should be set so that even with the time delay, the water level in the gauge won't fall below the safe level before the boiler is shut off.

Contracts evaporate

Nor did they mention the fact that Mr. Mitchell could likely have cleared up the misconception without writing an inquiry to ASME because one of his colleagues at McDonnell, Mr. James, was then serving as vice chairman of the society's boiler-code subcommittee. Mr. James, in fact, had just helped write the pertinent section of the boiler code, using, among other things, Hydrolevel diagrams.

Mr. James apparently knew of Mr. Mitchell's letter to the ASME. The customary procedure for handling such an inquiry, according to the ASME, would involve assistance and compliance of the subcommittee's vice chairman, then Mr. James. Indeed, records show that he received a carbon of the ASME's eventual reply to Mr. Mitchell.

That letter, signed by the ASME's secretary, didn't restate Mr. Mitchell's original question, thus compounding the misconception that a time-delay feature was dangerous. McDonnell salesmen continued to circulate the letter among their customers well into 1972 after ITT's acquisition of McDonnell late in 1971.

As the resulting rumors spread, Mr. Rymer began to see potential contracts evaporate. Mail from confused prospective customers began to pile up on his desk: "If I'm not mistaken, ASME doesn't permit a delay in shutting off the burner." read one received two years ago from an executive at Slant-Finn Corp., a Greenvale, N.Y., boiler maker.

The letters kept coming, despite a letter the ASME committee sent Hydrolevel two years ago, advising that "there is no intent (in the boiler code) to prohibit the use of low-water fuel cutoffs having time delays..." But in Mr. Rymer's view, the letter came too late. For by then, he had no idea who has seen the original ASME letter, who had received secondhand information or how to contact them all if he had been able to find out.

A matter for the courts?

Mr. Rymer did take the matter to the Federal Trade Commission, but no action has been taken. In a letter last

year to Mr. Rymer, an FTC attorney noted. "Examination of the information in our file doesn't disclose any act which is clearly subject to question under the antitrust and trade regulation statutes . . . with the possible exception of the (ASME) committee interpretation on acceptability of a time-delay low-water cutoff." Then he added: "Since that interpretation was corrected through a revised interpretation there is no further basis for corrective action by the commission."

The FTC apparently feels the dispute is a matter for the courts, but Mr. Rymer, noting Hydrolevel's pint-size revenues, feels his chances of taking ITT to court and emerging solvent are dim.

Introduced in the
United States District Court
for the Eastern District of New York

[PX 5, p. AS 18; HX V. 75]

The American Society of Mechanical Engineers

3125 Logan Drive
Pensacola, Florida 32503

July 25, 1974

Dr. Rogers B. Finch
ASME
United Engineering Center
345 East 47th Street
New York, N.Y. 10017

Dear Rogers:

I am enclosing a copy of a letter from Jim Roy, Secretary of Region XI, along with a copy of the article from the *Wall Street Journal* to which Jim's letter refers.

I am sure you are more familiar with the pertinent details of the situation than I am from reading this one article which may be exaggerated to make it more newsworthy, but it appears that some action on the part of ASME is required. If the facts are as stated in the article, it would seem that Mr. James should not only be relieved of his duties on the boiler code committee but he should also be kicked out of ASME for unethical conduct.

In addition, if the facts are as shown in the article, ASME should pay for a one page advertisement in all pertinent trade publications stating the facts and afirming that the Hydrolevel Control does meet ASME codes. In addition, a written letter of apology should be sent to Mr. Rymer.

I would like to request that this problem be placed on the agenda of the next meeting of the Executive Committee of Council for full discussion. Hopefully, the discussion will result in a solution and/or statement that can be passed on to members who may ask me and other officers of the society about this situation.

Rogers, I'm sure ASME did not intentionally get into this problem but we have nevertheless been seriously implicated (according to the article) and have been a party (unwittingly) to restricting Mr. Rymer from selling his product and we should take some action to remedy both situations.

Sincerely,

S/Paul T. Howse, Jr.

Paul T. Howse, Jr., P.E.
Vice President for Region XI
ASME

cc: Council
C.T. Carley

Introduced in the
United States District Court
for the Eastern District of New York

[PX 5, pp. AS 183-86; AX V. 91-96]

The American Society of Mechanical Engineers

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PROFESSIONAL PRACTICE
COMMITTEE ASME

•••

November 19, 1974

MINUTES OF MEETING
PROFESSIONAL PRACTICE COMMITTEE ASME

9:30 A.M., Tuesday, November 19, 1974
STATLER HILTON HOTEL
NEW YORK, NEW YORK

1. The regular meeting of the PPC was called to order by Chairman Charles C. Space at 9:30 A.M., November 19, 1974, with the following present:

C. C. Space, J. R. Booton, E. N. Friesen, H. B. Koning, C. H. Long, S. C. Leland, W. H. Metcalf, R. W. Mills, J. H. Palmer, R. .E. Roberts, W. A. Shearer, Jr., L. E. Sissom, and E. H. Walton of the Staff; Also part-time K. T. Knight, E. B. Mansfield, R. M. Nee, E. W. Nelson, and R. B. Robertson.

• • •

6. Review of action on ethics violation. Following the September PPC meeting, Mr. Space met with Mel Green and other staff members of codes and standards. The net result of the review with these individuals was that the Wall Street Journal article was slanted and included excerpts from information which, taken out of context, made a good story. Mr. Space proposed a resolution to be passed by the PPC. (This resolution was reviewed by M. R. Green, L. P. Zick, Chairman of the Boiler and Pressure Vessel Committee, and

W. L. Harding, Vice Chairman.) The Committee VOTED to endorse a resolution (attached) and to request that it be published in Mechanical Engineering.

An inquiry was raised as to what steps are taken by the Society to assure the qualification of members of Code Writing Committees. Two members of the Committee on Organization described the procedures of that body for this purpose when recommending appointment nominations to the Council. MOTION to advise the Committee on Organization to adopt a requirement that all members of Code Committees be members of a professional society in order to avoid conflict between the Canons of Ethics and the desire of the profession to be self-regulating. (The motion carried.)

• • •

Respectfully submitted,

s/ CHARLES C. SPACE
Charles C. Space
Chairman

Resolution

Professional Practice Committee

The Professional Practice Committee was requested to investigate the circumstances surrounding a July 9, 1974 Wall Street Journal article, alleging improper influence and use of ASME Codes and Standards by an ASME Committee Member.

PPC investigated the entire incident, and found no basis for further consideration of the issue. The committee normally would limit its statement to this information; however, the facts surrounding the case demand further comment.

The case centered on a Wall Street Journal article which implied that a boiler control manufacturer (Firm A) had sought a ruling from an ASME subcommittee of which an executive of Firm A was Vice Chairman. It further implied that the ruling, which was not favorable to Firm B, was influenced by this Vice Chairman, and used to the detriment of Firm B's economic interest.

The facts of the case are that the inquiry was processed and the reply prepared and issued in full accord with ASME policies and procedures. The initial inquiry was referred to the Secretary of the Boiler and Pressure Vessel Committee and, then, to the chairman of the subcommittee involved. This individual, not connected with either Firm A or B, prepared a response which was subsequently transmitted by the Secretary.

Subsequently Firm B wrote to ASME protesting the ruling. When the subject was referred to the subcommittee, the executive of Firm A (who had succeeded to the chairmanship fo the subcommitee) turned over the chair and did not participate in discussion on that item. When that subcommittee had completed its review, the entire subject was placed before the full Boiler and Pressure Vessel Committee which voted approval of the reply which was ultimately sent to Firm B in answer to its inquiry.

Since the matter received widespread publicity, the PPC feels that the members of ASME should hear a more objective reporting of the case, and in fact to commend the chairman of the Boiler and Pressure Vessel Subcommittee on Heating Boilers for conducting himself in a forthright manner.

It is unfortunate that those serving on ASME committees are periodically subjected to harrassment in their line of duty. We feel that strong support by the membership is appropriate when improper attacks are made on these ASME members.

As a corollary, the PPC committee chairman reviewed the current ASME procedures for handling code interpretation inquiries and for handling external correspondence on these sensitive issues. The current procedures were found to be extremely well founded—in fact, without strict adherence to these procedures, ASME codes, with their public safety goals, could not be as effective.

We commend those members who serve in this worthwhile activity.

Introduced in the
United States District Court
for the Eastern District of New York

[PX 17A at Exh. 14; AX V. 108]

The Wall Street Journal, April 7, 1975

Official at ITT Unit Destroyed Letters After Journal Questioned Some Practices

By Priscilla S. Meyer

NEW YORK—A retired official of an International Telephone & Telegraph Corp. subsidiary disclosed in testimony before a Senate subcommittee that last summer while he was still with the company, he destroyed certain letters in his file after The Wall Street Journal began questioning the unit's competitive practices.

"I was scared." John James told the Senate Subcommittee on Antitrust and Monopoly, which is investigating the effectiveness of voluntary industry standards. "I have been associated with code and standard-making activities for many years and this was the first time in all of that experience that I had had anybody question the propriety of the way I conducted myself in connection with this type of work." he said.

Mr. James retired in January as vice president, research for McDonnell & Miller Inc., a boiler-control maker acquired by ITT in late 1971. Simultaneously with his job at McDonnell, he served as vice chairman and then chairman of the American Society of Mechanical Engineers' boiler code committee.

Last July this newspaper reported on certain problems Hydrolevel Corp., a small Farmingdale, N.Y. maker of boiler controls, was having as a result of a marketing ploy of McDonnell, which has more than 85% of this $10 million annual market.

At issue were the circumstances under which McDonnell obtained and circulated a letter from the society, the industry standard setting organization, implying Hydrolevel's control didn't meet industry standards. Hydrolevel had just made its first big sale.

As a result of the letter, Hydrolevel saw potential sales dry up, even though the society eventually confirmed in a letter to Hydrolevel that its control did meet the standards. As of last July neither the Federal Trade Commission nor anyone else seemed much interested in Hydrolevel's plight.

Last month McDonnell officials testified before the Senate subcommittee that before sending the query to the society that resulted in the letter, they broached the question of an exchange of letters at a dinner in Chicago with T. R. Hardin, an insurance official who headed the society committee.

Next, according to testimony, came a carefully worded draft of a question about the type of boiler control made by Hydrolevel that was, in fact, shuttled back and forth between Mr. James and Mr. Hardin for suggested changes before it was officially mailed to the society (which then sent the question to Mr. Hardin for reply.)

It's the correspondence between Mr. Hardin and Mr. James over the first letter of inquiry from McDonnell that Mr. James said he destroyed.

Finally, Mr. Hardin replied to the society, and this is the letter that when read without the original carefully worded question incorrectly implied that Hydrolevel's control violates the boiler code.

Then, according to the testimony of Eugene Mitchell, McDonnell's vice president, sales, McDonnell prepared a looseleaf notebook for use at its regional sales meetings that included the misleading society letter. It also included a "personal and confidential" memo stating that time delay—the type boiler control made by Hydrolevel—"would very definitely be against the society's code." It told its salesmen "This should definitely be brought to the attention

of anyone considering the device which included a time delay in the low water cut off."

Mr. Mitchell accompanied the notebook with a speech. "The Opposition—Who They Are and How to Beat Them."

Mr. James said he disqualified himself from the society committee that took up Hydrolevel's complaint. The little company complained to the society when it discovered from potential customers the existence of the society's letter to McDonnell that implied Hydrolevel's control didn't meet society standards. Mr. James also testified, however, he later got back into the act and actually drafted a key paragraph of the final letter sent from the society to Hydrolevel.

The McDonnell officials testified they never discussed with anyone at the society the dinner and exchange of correspondence with Mr. Hardin, the destruction of that correspondence or the sales notebook that used the society's letter in connection with the "Beat Them" speech. Does the society believe it has been duped?

After reviewing the testimony, an arm of the society came up with a conclusion that appears in the current issue of Mechanical Engineering. It commends Mr. James on his testimony and says the Society's Professional Practice Committee "finds no improper or unethical conduct in his actions."

Introduced in the
United States District Court
for the Eastern District of New York

[PX 5 at Exh. 19; HX V. 69-70]

The American Society of Mechanical Engineers

•••

April 16, 1975

C.C. Space
Reynolds, Smith & Hills
P.O. Box 4850
Jacksonville, Florida 32201

Dear Charlie,

I received your letter concerning the problem with John James and his activity on the ASME Boiler and Pressure Vessel Committee.

I am extremely embarrassed to be a part of the resolution appearing in the March, 1975 Mechanical Engineering magazine wherein the Professional Practice Committee concluded John James conducted himself in the proper manner. As you stated this appeared to be in accordance with the facts in our possession at the time. However, somehow all of the facts were unknown. It seems to me the original position of the committee in which we asked Mr. James to appear might have ferreted out more information. I feel the testimony given in the Congress could have been known prior to the publishing of the March 1975 resolution.

I do not think it is good practice to have an arm of the Society investigate its own activities, therefore I propose if the Professional Practice Committee is to perform and assume the responsibility then it should pursue the following steps:

1) develop a hearing procedure

2) require those in question to appear in person or automatically be deprived of their membership

3) a complete record of the hearing be made and the gist of the hearing be reported to the membership

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[2]

In areas of code preparation we could well have conflicts of interest and somehow non-partial review boards should be established.

This is not to reflect on any of the good work which has been done by the various Code bodies but rather to enhance their values by being able to refer to review procedure when confronted by those who might make the charge that the codes are self-serving to some of the supporting organizations.

At least it appears on the surface that our credibility as a Professional Practice Committee and a Society has been severely damaged.

Sincerely,
S/ Bill
W. A. Shearer, Jr.

WAS:pg

Introduced in the
United States District Court
for the Eastern District of New York

EXTRACT FROM DEPOSITION OF JOHN JAMES

[PX 16A, pp. 188; HX V. 196]

Q. Were you, during your entire time with McDonnell & Miller, on a regular salary?

A. Yes, sir.

Q. Did you get paid that regular salary during the time that you were working on ASME business?

A. Yes, sir.

Q. When you made trips out of town on ASME business, and you incurred hotel and travel, and other related expenses, who reimbursed you for those expenses?

A. McDonnell & Miller.

Q. Did they do that on all occasions?

A. Yes, sir.

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Introduced in the
United States District Court
for the Eastern District of New York

EXTRACT FROM DEPOSITION OF JOHN JAMES

(PX 16A, pp. 1149-51; HX V. 243-45)

[PX 16A, p. 1149; HX V. 243]

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Why if you saw a conflict of interest at the outset didn't you stay absolutely clear of this entire involvement and let Messrs. Harrison and Dow proceed and write their own reply?

A. Mr. Counsel, I sense that your question has three answers, is that correct?

Q. I'm not here to answer that kind of question. Please, if you understand my question, answer it.

A. The first part of your three-part question deals with the Section 4 subcommittee meeting, and I felt that when the Hydrolevel March 23, 1972 letter came up for discussion, it would be better if I relieved myself from the chair while the discussion took place.

May I remind you there are many discussions of a nature like this where the chairmen do not remove themselves from the chair.

As regards the question that deals with my reporting of this subcommittee to the main committee, my previous testimony endeavored to show you that this was committee procedure, and even though others could have reported this action who attended the Subcommittee on Heating Boilers, I saw no reason if I presented the

[PX 16A, p. 1150; HX V. 244]

facts of what occurred at that meeting as best I knew them that there was any objection to that, and as regards the last point, I felt that this was a matter that this subgroup was

considering and if I offered a suggestion, what was wrong with that.

Q. As of the time you offered this suggestion to Messsrs. Dow and Harrison, didn't you see a conflict of interest in suggesting a final paragraph to a letter that ASME was to send to Hydrolevel when you yourself as you knew, even if you hadn't reported to anybody else at ASME had in the first instance drafted the McDonnell & Miller inquiry which elicited the ASME April 29, 1971 response?

A. Mr. Counsel, how did I know when I sent that letter that the reply that Mr. Harrison would send to Mr. Zick would not have included Mr. Dow's last paragraph? I didn't know that they were going to accept my last paragraph.

Q. But you could have simply chosen not to interject yourself into the matter at all, and have made no suggestion to Mr. Harrison and Mr. Dow about the form of their letter. Why didn't you do that? Why didn't you stay clear?

A. I could have, but I didn't.

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[PX 16A, p. 1151; HX V. 245]

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Q. Did you see a conflict of interest in your chairing the consideration of the Hydrolevel matter on May 4, 1972?

A. I recognized a conflict of interest, but in that case I decided to have someone else chair the meeting, as I did in other matters coming before the subcommittee at subsequent times.

Q. What could represent a more flagrant conflict of interest than your including in a letter to the people who are supposed to draft a reply to Hydrolevel your suggested language for the ASME reply?

A. I did not consider this a flagrant conflict of interest.

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Introduced in the
United States District Court
for the Eastern District of New York

EXTRACT FROM DEPOSITION OF JOHN BONNER

(PX 2; AX V. 131-32)

[PX 2, p. 115; AX V. 131]

•••

Q. When you say you had no definite information about this lawsuit, what do you mean?

A. I didn't know what prompted, what brought about a complaint, and when Mr. Wrobleski showed me these two letters, the one inquiry from, I think it was an engineering firm or a boiler inspection firm, I don't know who it was, but to ASME, who was supposed to know all the answers in such matters, and when I read that reply immediately I could understand what somebody might think they were justified in complaining.

Q. What did you understand what might have been justified in terms of the complaint?

A. The inquiry in the letter was, is this device acceptable to you, do you recommend its being used,

[PX 2, p. 116; AX V. 132]

or should we use it. Words to that effect. And the reply was it creates a hazardous situation in that when used it does not cut off the fuel supply. That's the way they speak of it, cut off the fuel supply to the boiler so that the water remains visible in the gauge glass.

Q. That was the reply by the ASME as you understood it?

A. Yes.

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In the

United States District Court

For the Eastern District of New York

Extract from

Trial Testimony of Dominick De Leonardis

(Direct Examination)

[Tr. 36; App. 187]

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So I did contact ASME and talked to a Mr. Brad Hoyt, and he said that he would need more information, that he was very busy. He got 4,500 letters a day, I think he said, and he needed more information and couldn't answer me.

So I called Mr. Nobles back again, and I said to him, what is the date of the letter, and he gave me the date; it was April 29, 1971.

April 12—no, April 29, 1971, and he said—I asked him the contents of the letter and he really didn't want to get involved, but he read it hurriedly and I got some of it down, and then I recall that I called Mr. Hoyt again and he said that he would need more information, and I think I called—I think I talked about 4 times to Mr. Nobles and then finally told me there was a letter of April 12th. That this letter was a letter answering the letter of April 12th, and I asked him to send me a copy of the letter, and he said he couldn't send it to me. I asked him who showed him the letters, and he said morally he couldn't tell

[Tr. 37; App. 188]

me who showed it. I said, if this is public information that ASME sent out, why can't you show it to me, and he said, I have a moral obligation to someone, and I don't want to break that confidence, and I can't tell you who it is nor show you the letter.

Q. Did he indicate that he had given a promise to that person?

A. Yes.

I contacted Mr. Hoyt and sent him a letter. He said to send him a letter, which I did, and in the letter I requested a copy of the April 29, 1971 letter.

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[Tr. 41; App. 192]

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Q. Mr. DeLeonardis, in the letter which you received from Mr. Sutton of the American Society of Mechanical Engineers, does it contain the name of the addressee, Mr. Gene Mitchell?

A. No, it does not.

Q. Of McDonnell & Miller?

A. No, it does not.

Q. Does it contain the first introductory paragraph?

A. No, it does not.

Q. Mr. Hoyt to Mr. Mitchell:

"The inquiry contained in your letter of April 12th, 1971, was referred to the Chairman of the concerned Subcommittee who offers the following advice: . . ."

A. That was all deleted.

Q. What is the significance to you of the deletion of the paragraph making reference to the Chairman of the concerned Subcommittee?

A. If the paragraph was in, to me it would mean an official ASME ruling.

Q. Who was the Chairman of the concerned Subcommittee?

[Tr. 42; App. 193]

A. Ty Hardin.

Q. Did Mr. Hoyt or Mr. Sutton at any time disclose to you that this inquiry was posed by McDonnell & Miller, and that the reply was sent to McDonnell & Miller?

A. Mr. Hoyt said in the letter that it was of no concern to us who the addressee was.

Q. What was the concern to you as to who the addressee was?

A. They were our competitor. We would want to know that, plus the first paragraph makes it an official ASME ruling.

Q. Did there come a period of time in which they did send you a letter showing you the opening paragraph indicating that the reply was from Mr. Hardin—or rather the Chairman of the Subcommittee?

A. I believe the first time I saw that was just prior to going to the Senate Hearing down in Washington.

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IN THE

United States District Court

FOR THE EASTERN DISTRICT OF NEW YORK

EXTRACT FROM

TRIAL TESTIMONY OF DOMINICK DE LEONARDIS

(Cross Examination)

[Tr. 140; App. 293]

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Turning to Exhibit BM-1, if the last paragraph on the first page says:

In reply to our correspondence, ASME forwarded us the enclosed letter which clearly removes any

[Tr. 141; App. 294]

"objection against the use of time delays with low water fuel cut-offs."

And my question is, when you used the words "the enclosed letter", weren't you sending to Mr. Limoni at Slant/Fin a copy of the ASME letter of June 9, 1972?

A. Yes, I did

Q. Did you send it to other people, too?

A. I must have—I sent it to a few other people. Mr. Limoni never bought any controls.

Q. He never bought any controls? Was he the one who said they were too expensive?

A. No. He said it didn't meet the ASME Code.

Q. You showed him the letter?

A. And he didn't buy.

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IN THE

United States District Court

FOR THE EASTERN DISTRICT OF NEW YORK

EXTRACT FROM

TRIAL TESTIMONY OF MELVIN R. GREEN

(Redirect Examination)

[Tr. 648; App. 808]

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THE COURT: Would you have considered it proper yourself if he had asked you to have James step down – I don't know whether he did – and then participate in the drafting of a response.

THE WITNESS: I'm not so certain that it happened like that. It is my understanding that he stepped down in the subcommittee meeting, and then a recommendation went before that subcommittee to the main committee and then Mr. Zick, who was chairman of the main committee, suggested that a task group take a look at the proposed draft, and to come back with whatever re-wording, so it could be submitted to the whole main committee which would be in accordance with our procedures for a formal inquiry, and also it gives the inquirer the benefit of a greater distribution of the results of his inquiry if it is handled formally,

[Tr. 649; App. 809]

because you're sending it to over 300 people and these people have an opportunity to consider it and nearly a hundred of them have an opportunity to vote on the proposed thing.

I don't think it is this stepping down that was brought out and coming back and being-putting his own words there.

THE COURT: What happened? I'm not clear, so far as your inquiry showed what actually happened?

THE WITNESS: Well I've read, and I have to go by what I have read, that the task group considered input from Mr. James along with other input, and there was some change to

the proposed draft that went out to the main committee for final ballot approval.

THE COURT: I put the same question that I put a moment ago: If you stepped down because you're personally involved, and I take it that is the reason you stepped down, you consider it proper to then particpate in future deliberations on the subject?

THE WITNESS: In the Boiler and Pressure Vessel committee, the chairman of a subcommittee

[Tr. 650; App. 810]

has responsibilities. The chairman of the subcommittee who stepped down the next day was a member of the main committee, another body, and he had to report on behalf of the subcommittee that the subcommittee on Heating and Boilers, he was taking their works and reporting to the main committee.

I don't see anything inconsistent about that. This is his role and was at the time, and he was vice chairman at the time.

THE COURT: Assuming it was a passive conduit of information, I'll put it to you again: Do you consider it proper form to do more than partickipate [sic] in the drafting of the communication when he had stepped down, apparently because he felt there might be an impropriety or a conflict if he participated?

THE WITNESS: I don't think it is as clear as that. If he is helping the inquirer and if the evidence shows that he is helping the inquirer by an editorial change, then I think it is proper. Because he is doing it for the main committee then and he is not doing it for the subcommittee, the smaller body that considered the inquiry.

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF NEW YORK

EXTRACT FROM

TRIAL TESTIMONY OF W. BRADFORD HOYT

(Cross Examination)

[Tr. 718; App. 878]

***

Q. Now please turn to page three, paragraph 4C.

That paragraph is, is it not, your express corporate authority as secretary of the Boiler and Pressure Vessel Committee to interpret the code?

A. That is the way I read it, yes.

Q. Now, the purpose of the Boiler and Pressure Vessel Committee was, was it not, to act on behalf of the council which is, I take it, and think you will agree, equivalent to the Board of Directors of the Corporation?

A. Yes,

Q. And you, Mr. Hoyt, as indicated on page 7, you were, were you not, an officer of the main committee, the Boiler and Pressure Vessel Committee?

A. That is correct.

***

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF NEW YORK

EXTRACT FROM

TRIAL TESTIMONY OF W. BRADFORD HOYT

(Cross Examination)

[Tr. 741; App. 901]

Q. Now, you have in section 8.01 a procedure, do you not, for responding to inquiries?

A. Yes.

Q. A says, that routine questions such as those fro [sic] printed matter, be handled by the secretary; that's you, is it not?

A. The secretarial staff, yes.

Q. So you would agree that the McDonald [sic] Miller letter of April 12, 1971, was not a routine inquiry under 8-A?

A. I would agree.

Q. Under 8-B, it says that letters which are indefinite as to the question, the inquiry, which is answered what paragraph of the code is referred to or incomplete and not clear, because of lack of blue prints or sketches, shall be answered by the secretary using the letter or one slightly modified as attached and marked with form A.

Now, the April '71 letter specifically referred to HG 605A of the code?

A. You are talking about the letter signed by Mr. Mitchell?

Q. Yes.

A. Yes.

Q. So in other words, 8-B doesn't apply, does it?

[Tr. 742; App. 902]

A. It does not apply.

Q. 8-C refers to commercial questions. Questions dealing with some competitive or commercial angle of the manufacturer's product.

This connection, the committee must exercise the greatest care, so it cannot be accused of compromising a safety code for commercial reasons.

Important questions of this kind must receive the consideration of the commitee.

However, it may be possible to handle some of the simpler inquiries of this type by using a letter such as attached and marked Form D.

Now, you did not treat the Mitchell letter of April 12, '71 as an 8-C problem, did you?

A. That is correct.

Under 8-D, it refers to approval of apparatus and designs, as has been customary for the secretary, it answers this type of inquiry with the letter shown in Form C.

And you did not treat the McDonald [sic] Miller letter under 8-D, did you?

A. That is correct.

Q. Under 8.02 with respect to the procedure, it is the procedure, is it not, for following by the

[Tr. 743; App. 903]

committees of communications and how to handle them?

A. Yes.

Q. So that it indicates, does it not, a considerable portion cannot be handled in the manner outlined above, and msut [sic] therefore receive the consideration of a subcommittee or the main committee.

And I take it then, just in the first instance, it is 8.02 which governed your actions or you made the judgmet [sic] that your actions were governed by an 8.02 procedure, did you not?

A. That is correct.

Q. Number 8.02-A, it says unofficial communications.

If the question has been previously covered by an interpretation or communication, it could be answered by direct reference to the code.

The subcommittee or special committee chairman shall outline the reply to be sent by the secretary.

An unofficial communication or in those instances where the secretary has answered similar answers previously, he may answer the inquiry based on previous replies.

Copies of unofficial communications should be sent to the chairman of the subcommittee involved.

I take it that you did not use 8.02-A as the manner for treating the Hoyt-Mitchell letter, did you?

[Tr. 744; App. 904]

A. It was answered in accordance with 8.02-A, because the inquiry was referred to the chairman of the subcommittee for his recommendation.

It says here, the subcommittee chairman shall outline the reply to be sent by the secretary.

Q. All right.

A. That is what happened.

Q. So you made the judgment that the Mitchell letter of April 12, 1971, was to be handled with the procedures under 8.02-A, did you not?

A. Yes.

Q. The fact of the matter is, there was no previous request for an interpretation under HG 605 with respect to a time delay incorporated into a low water cut-off, was there?

A. I could not find any.

Q. And you did look, did you not?

A. Yes, I did.

Q. And you previously testified under oath, consistently back in 1978, that this was no such interpretation, did you not?

A. To the best of my knowledge, there was no previous question raisded [sic] on that subject.

[Tr. 745; App. 905]

CROSS EXAMINATION

BY MR. WILLIAMSON (continuing):

Q. Now, you did not personally draft the body of the reply to the April 12, 1971, letter, did you?

A. That is correct.

Q. And you, when you received that letter of April 12, 1971, you did not, did you, even bother to look at the language of HG 605 of the Code, did you?

A. That is correct.

Q. Now, when you sent the letter of inquiry, you sent it to Mr. Hardin, did you not?

A. Yes.

A. Did you send that letter of inquiry to anyone else?

A. I don't recall offhand.

Copies might have been sent to the secretary of the subcommittee and to the chairman and vice chairman of the main committee. It must be in the record there someplace.

Q. Who was the secretary of the subcommittee at that time?

A. Ed Dow.

Q. And what was the area of his economic interest, as we have been referring to it—who was his

[Tr. 746; App. 906]

employer?

A. His employer, I believe, was Hartford Steam & Boiler.

Q. That is the same employer as Mr. Hardin's, is that not correct?

A. Yes– Well, I'm not positive whether Mr. Dow was a voting member of the committee at that time. He probably was not. In other words, he would be acting as secretary of the committee because of the convenient relationship that they both were in the same building.

Q. Now, at that time that you received that inquiry, did you have any knowledge at all as to what a time delay incorporated into a low-water cutoff was?

A. Not at that time.

Q. Did you check the file at that time contemporaneously to see whether there was an existing interpretation?

A. I believe I just answered that, yes.

Q. And you found none?

A. I found nothing relating to that.

Q. Now, even though the language says, "unofficial," would you agree with me from the point of view of the authority who issued it and from the point of view of its impact, it is as official as an "unofficial"

[Tr. 747, App. 907]

reply?

A. I would agree.

Q. In other words, it is entitled to the equivalent of official weight at the time that you, as a staff member's secretary, sent it out to the inquirer; isn't that correct?

A. That's right.

The use of the term "official" and "unofficial" as shown in the procedures is a purely internal matter for the committee.

Q. So as far as McDonnell & Miller was concerned, they were receiving a reply which had the equivalent of official weight.

A. That's right.

Q. And if anyone saw that letter in the trade they would view it as the equivalent of official weight?

A. That's right

Q. You did have some understanding in June of '71 as to what a probe type low-water fuel cutoff was, didn't you?

A. Only from a very layman's point of view. I believe all the members of the jury know as much about a probe type cutoff as I do.

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Office-Supreme Court, U.S.
FILED
MAY 22 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1765

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,
Petitioner,

v.

HYDROLEVEL CORPORATION,
Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

CARL W. SCHWARZ
One Farragut Square South
Washington, D.C. 20006
(202) 347-1631

Attorney for Respondent Hydrolevel Corporation

STEPHEN P. MURPHY
WILLIAM H. BARRETT
METZGER, SHADYAC & SCHWARZ

Of Counsel

May 22, 1981

RESTATEMENT OF THE QUESTIONS PRESENTED

1. Whether a private corporation organized as a "non-profit, voluntary, membership organization," having assumed through its standard-setting activities "great economic influence" over an entire industry, is subject to antitrust liability for the acts of its employees and other agents under the same legal standard that applies to other corporations or under some lesser rule.

2. Whether such a private corporation is subject to antitrust liability for the acts of its employees and other agents where such acts are ratified by corporate officers after disclosure of all material facts.

3. Whether the evidence below was sufficient to support the jury's verdict that the petitioner, through its employees and agents, participated in a conspiracy to restrain trade and to monopolize *either* under the legal standard with which the District Court charged the jury (which was proposed by the petitioner and which the petitioner told the Court of Appeals was "generally accurate") *or* under the even less favorable standard enunciated by the Court of Appeals.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent Hydrolevel Corporation ("Hydrolevel") opposes the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit filed by The American Society of Mechanical Engineers, Inc. ("ASME"). Hydrolevel contends that the Opinion of the Court of Appeals below, contained in the Appendix to the Petition, is a correct decision which raises no considerations described in Rule 17 of this Court and which, in fact, raises no issue properly reviewable by a writ of certiorari.

COUNTERSTATEMENT OF THE CASE

Consistent with its narrow view of the record below, the ASME has presented in its Petition a limited selection of the "facts" while at the same time taking liberties with the facts presented. In order to more accurately reflect the evidence as submitted to the jury, a short statement of clarification is in order. Hydrolevel has filed its own Petition for a Writ of Certiorari to review another aspect of the decision of the Court of Appeals, No. 80-1771, and hereby incorporates by reference the statement of the case made therein.

First and foremost, Messrs. Hardin* and James,** the ASME members principally involved in the issuance of the April 29, 1971 interpretative letter, were, at all times, specifically authorized by the ASME to engage in activities associated with interpretation of the ASME's Boiler and Pressure Vessel Code (the "B-PV Code") as it pertained to the boiler controls

* T. R. Hardin was a Vice President of Hartford Steam Boiler Inspection and Insurance Co. He was also the Chairman of the ASME's Section IV Heating Boiler Subcommittee (the "Subcommittee") which is charged with the responsibility of interpreting the ASME codes as they apply to boiler controls.

** John W. James was a Vice President of McDonnell & Miller Inc. ("M&M/ITT"), a soon-to-be-acquired subsidiary of International Telephone & Telegraph Co. Mr. James was Vice Chairman of the Subcommittee.

manufactured by Hydrolevel, M&M/ITT and others. These individuals drafted the inquiry signed by Mr. Eugene Mitchell, an officer of M&M/ITT, to the ASME dated April 12, 1971, an inquiry which raised significant questions about the acceptability of Hydrolevel's major product under the B-PV Code. These questions were of such a commercial and competitive nature that, under express ASME rules of procedure, it should have been directed to the full Boiler and Pressure Vessel Committee (the "Committee"). Nevertheless, W. Bradford Hoyt, a senior ASME employee, routed the letter to the Chairman of the Subcommittee, Mr. Hardin. Upon receipt of Mr. Hardin's suggested reply, Mr. Hoyt incorporated it verbatim into a letter dated April 29, 1971 over his signature and immediately sent out ASME's response to the April 12, 1971 inquiry.

Following Hydrolevel's discovery of the April 29, 1971 letter in January of 1972, a demand was made upon Mr. Hoyt by Hydrolevel for a full copy of the letter. The ASME stalled, sending a cropped version of the letter which deleted the addressee, M&M/ITT, and left out the paragraph showing who drafted the response. Following another more forceful demand by Hydrolevel, Mr. Hoyt sent a second slightly less redacted version to Hydrolevel but *still* refused to give Hydrolevel the full details.

It was not until May of 1972 that the full Subcommittee, in response to Hydrolevel's continuing complaints, held a meeting to consider the April 29, 1971 letter and Hydrolevel's request that a "correcting statement" be circulated "generally among all who might reasonably have become privy to [the April 29, 1971] letter." Hydrolevel was never given advance notice of this or any other meeting held by the ASME on the subject of the April 29, 1971 letter.

The result of this May 1972 Subcommittee meeting (and of a later full Committee meeting) was a letter to Hydrolevel dated June 9, 1972, which was written by Mr. James and signed by Mr. Hoyt. The first substantive sentence read as follows:

> The Committee confirmed the intent of our letter to the attention of Mr. D. DeLeonardis of February 8, 1972.

The letter of February 8th was the first redacted version of the April 29, 1971 letter which was sent to Hydrolevel. Mr. James' careful drafting thus produced a "correcting statement" which not only confirmed the April 29th letter but was also couched in technical language and made no reference to Hydrolevel or its products.

A draft of the June 9th letter was sent to only one representative of a substantial potential direct purchaser of boiler controls and he received it only because, as one of ninety-two (92) attendees at the May 1972 meetings, he was entitled to receive the fifty (50) page minutes of the meetings to which the draft June 1972 letter was attached as a sixth appendix. ASME made no other efforts to circulate the June 9, 1972 letter.

Hydrolevel was the *only* recipient of the final version of the letter, which did not dispel the continuing doubts of the only two customers who were shown the letter about the acceptability of Hydrolevel controls under the B-PV Code. Despite the obvious importance of this new ASME action, the ASME never informed Hydrolevel that any "appeal" procedure within ASME existed and Hydrolevel had no means of obtaining this information because neither it nor any member of its industry, other than M&M/ITT, had ever had a representative on the full Committee or on the Subcommittee which effectively controlled their livelihood.

In July of 1974, the *Wall Street Journal* printed an article concerning Hydrolevel, the issuance of the April 29, 1971 letter and the June 9, 1972 "correcting statement."* Mr. James, who by this time was the Chairman of the Subcommittee,** reacted by destroying his ASME file. M&M/ITT lawyers reacted by preparing a letter for Mr. James to send to ASME in which he corroborated many of the allegations of the *Journal* article, including the fact that M&M/ITT had been using the original ASME letter with potential Hydrolevel customers.

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* After being tipped off by Mr. Hoyt that the newspaper was investigating, M&M/ITT attempted to prevent publication of the article.

** Mr. James had become Chairman of the Subcommittee after Mr. Hardin's sudden resignation shortly before the May 1972 meetings.

Mr. Paul T. Howse, a Vice President and member of the Board of Directors of ASME, reacted to the *Wall Street Journal* article by writing to the President of the ASME with a request that, if the facts in the article were to be corroborated, a full page apology should be published in the ASME magazine and with the further request that consideration by the Executive Committee of the ASME be given to the Hydrolevel matter.*

No Executive Committee consideration of the Hydrolevel matter took place, no expulsion of Mr. James from the ASME occurred and no apology whatsoever was made by the ASME. Indeed, the "Professional Practice Committee" of the ASME, without even interviewing Mr. James and limiting its inquiry solely to whether Mr. James had "removed himself from the chair" at the May 1972 Subcommittee meeting, exonerated Mr. James and published in the ASME magazine a resolution praising Mr. James' conduct, a resolution cleared for content in advance by Mr. James himself.

In the spring of 1975, Mr. James and another M&M/ITT official testified at hearings being conducted by the Antitrust and Monopoly Subcommittee of the Committee on the Judiciary of the United States Senate concerning the issuance of the April 29, 1971 letter and its distribution throughout the industry. During these hearings Mr. James revealed that he had destroyed his ASME file on the "Hydrolevel affair." These revelations prompted Mr. William A. Shearer, Jr., a member of the Executive Committee of the "Professional Practice Committee" and a member of the ASME Board of Directors, to write to the ASME in April of 1975 taking it to task for not having "ferreted" out the true facts "concerning the problem of John James and his activity on the ASME Boiler and Pressure Vessel Committee." He strongly urged immediate implementation of procedures to avoid "conflicts of interest" and to offset the charge that "codes are self-serving to some of the supporting organizations." The ASME took no action on Mr. Shearer's recommendations and no action has been taken by the ASME

* Mr. Howse also noted that, if the facts recited in the article were true, the ASME had been a party to restricting Hydrolevel's trade and that Mr. James should be expelled from the ASME for "unethical conduct."

against Mr. James, or anyone else, in connection with this matter.

ARGUMENT

The questions presented in the Petition neither possess national importance nor otherwise are appropriate for review by this Court. Moreover, the rulings of the courts below, turning as they did on the particular facts in this case and supported by *several* legal standards of liability, were eminently correct in their conclusions and just in their result.

It is important to consider the significant concessions made in the ASME Petition. The ASME candidly acknowledges that there existed a conspiracy to restrain trade *and to monopolize,* as found by the jury in this case, and that the ASME participated in this conspiracy. More particularly, the ASME concedes that Hydrolevel was the target of this conspiracy and that Hydrolevel suffered competitive injury as a result thereof. In addition to these concessions, the ASME correctly points out that the Court of Appeals totally overlooked and failed to take into consideration the fact that the jury found the ASME liable for a *conspiracy to monopolize* as well as a conspiracy to restrain trade.

In essence, the ASME complains about the imposition of civil liability in a situation where its participation was only of an "unintentional" nature through the malfeasance of its "volunteer" members. From this the ASME constructs a legal argument that has been heard many times from profit-making corporations and which was rejected both by the District Court and by the Court of Appeals.

The fact is that this Court has repeatedly affirmed the general rule that a civil violation of the antitrust laws may be established by proof *either* of an unlawful intent *or* of an anticompetitive effect. *McLain* v. *Real Estate Bd. of New Orleans,* 444 U.S. 232, 243 (1980); *United States* v. *United States Gypsum Co.,* 438 U.S. 422, 436 n.13 (1978). *See Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.,* 604 F.2d 897, 906 n.1 (5th Cir. 1979) (Morgan, J. concurring in

part and dissenting in part) ("Although intent is a necessary element of a criminal antitrust offense, a defendant may incur *civil* liability for an unintentional violation of the antitrust laws.") (Emphasis in original.) Moreover, it is well settled by this Court that the act of one conspirator may be the act of all. *E.g., United States* v. *Kissell,* 218 U.S. 601, 607-08 (1910). These decisions of this Court are dispositive of the ASME's contentions that a disservice has been done to it by the courts below in holding it liable for its "unintentional" participation in the ongoing conspiracy whose ultimate effect was to destroy Hydrolevel.*

In its Petition, the ASME argues at length that the decision of the Court of Appeals is without legal support while at the same time contending that the correct legal standard was that which the ASME proposed to the District Court and *upon which the jury rendered its verdict.* A careful review of the Court of Appeals' decision reveals that its discussion of "apparent authority" was simply not necessary to the decision it reached since the jury's verdict could have been affirmed on two other more liberal standards.** What the Court of Appeals has done is nothing more than to affirm the verdict of the jury while stating that that verdict could stand *either* under the law as enunciated by the District Court *or* under the Court of Appeals' formulation.

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* The evidence presented to the jury strongly supports the jury's verdict that the ASME, through the acts of Mr. Hoyt and through its ratification of the scheme of Messrs. Hardin and James, *did* intentionally and purposefully engage in the conspiracy to restrain trade and to monopolize the market.

** As discussed above, the facts in the record, but omitted from the ASME Petition, strongly support the jury's conclusion that actual authority in fact existed and that the ASME did indeed ratify the acts of its employees and agents. *The ASME has never questioned the correctness of the actual charge of the District Court.* As a matter of fact, the ASME told the Court of Appeals that the charge of the District Court on the subject of "respondeat superior" was "generally correct."

CONCLUSION

The courts below correctly applied the principles established by this Court as to the antitrust liability of a corporation for the acts of its employees and agents. The decision below does not conflict with the decision of any other court of appeals nor does the petition offer any accepted basis upon which it should be granted. Accordingly, the petition for certiorari should be denied.

Respectfully submitted,

CARL W. SCHWARZ
One Farragut Square South
Washington, D.C. 20006
(202) 347-1631

Attorney for Respondent
Hydrolevel Corporation

STEPHEN P. MURPHY
WILLIAM H. BARRETT
METZGER, SHADYAC & SCHWARZ

Of Counsel

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No. 80-1765

In The Supreme Court of the United States

OCTOBER TERM 1980

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., *Petitioner-Respondent*

v.

HYDROLEVEL CORPORATION, *Respondent-Petitioner*

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HAROLD R. TYLER, JR.
Attorney for The American Society of Mechanical Engineers, Inc.
30 Rockefeller Plaza
New York, New York 10112
(212) 541-4000

Of Counsel:
RICHARD D. PARSONS
FREDERICK T. DAVIS
STEVEN C. CHAREN
PATTERSON, BELKNAP, WEBB & TYLER
30 Rockefeller Plaza
New York, New York 10112

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI OF THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS

Petitioner-Respondent The American Society of Mechanical Engineers ("ASME") respectfully submits this Reply Brief in response to the Brief in Oposition filed by Respondent-Petitioner Hydrolevel Corporation ("Hydrolevel"), opposing ASME's Petition for a Writ of Certiorari, Dkt. No. 80-1765. ASME's Petition seeks review of the liability portion of the Second Circuit's opinion in *Hydrolevel Corporation* v. *The American Society of Mechanical Engineers, Inc.*, 635 F.2d 118 (2d Cir. 1980). ASME has previously submitted a Brief in Opposition to Hydrolevel's separate Petition for Certiorari, Dkt. No. 80-1771, seeking review of the damages portion of the Court of Appeal's decision.

ARGUMENT

In ASME's Petition for review of that portion of the Second Circuit's opinion concerning antitrust liability, ASME's reasons for granting the Writ were squarely within those contemplated by Supreme Court Rule 17: The panel's decision — holding a corporate defendant liable as an "unintentional" participant in an anticompetitive conspiracy based upon the "apparent authority" of a disloyal agent — establishes an unprecedented new standard for vicarious liability under the federal antitrust laws which flatly contradicts every decision of this Court and of every Court of Appeals which has addresed this issue. *See* ASME Petition ("ASME P.") at 10-22. Furthermore, the panel's decision will be devastating to innumerable non-profit, voluntary membership organizations that rely on the efforts of volunteers to contribute immense benefits to the American public. *See* ASME P. at 22-24. This point in particular is underscored by the many *amicus curiae* briefs filed in support of ASME's Petition.

In opposition to ASME's Petition, Hydrolevel makes two principal arguments, both of which are completely without merit. First, Hydrolevel argues that the panel's extended discussion of "apparent authority" as a basis for antitrust liability was unnec-

essary to its decision, since the panel "could have" affirmed the finding of liability on other grounds. *See* Hydrolevel Brief in Opposition ("H. Br.Opp.") at 5-6. This argument misstates both the holding and the precedential effect of the opinion.

The panel unequivocally held that an organization may be liable for "unintentional participation" in an antitrust conspiracy if its agents were acting within the scope of their "apparent authority" when they committed anticompetitive acts, even if (a) the acts were neither authorized nor ratified by the organizaion, (b) the agents did not intend to, and did not in fact, benefit the organization by the actions, and (c) the agents actively deceived the organization for their own purposes and benefit, thereby preventing the organization from having knowledge of their motives and acts. This unprecedented "apparent authority" standard for vicarious liability in antitrust cases is now the law in the Second Circuit. Since the standard under which a corporation may be liable for the acts of its agents is relevant to almost every antitrust case in which a corporation is a defendant, henceforth rulings on the sufficiency of evidence and instructions to the jury will be governed by this standard in the Second Circuit and by the traditional standard in every other Circuit that has addressed this issue. *See* ASME P. at 15-22. Hydrolevel cannot and does not even attempt to refute ASME's demonstration that there is an irreconcilable conflict between the panel's decision in this case, on the one hand, and this Court's decisions in *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U.S. 344 (1922) and *Coronado Coal Co.* v. *United Mine Workers of America*, 268 U.S. 295 (1925), as well as every applicable decision of the federal Courts of Appeals, on the other hand. Accordingly, this Court should review the Second Circuit panel's decision and resolve this significant and far-reaching conflict.*

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*In addition, Hydrolevel's argument that the panel "could have" affirmed the finding of liability on other grounds is refuted by the opinion itself. In particular, the notion that ASME somehow "ratified" the conspiratorial activities of M&M, James and Hardin after it discovered them was implicity rejected by the panel, which noted that "ASME's sole contribution to the conspiracy was the April 1971 letter", A-23, and that ASME freed itself "from further liability" by publishing the June 1972

(Footnote continued on next page)

Second, Hydrolevel's disingenuous argument that "this Court has repeatedly affirmed the general rule that a civil violation of the antitrust laws may be established by proof *either* of an unlawful intent or of an anticompetitive effect," H. Br.Opp. at 5, and that the panel's "apparent authority" standard is somehow compelled by this "general rule," *id.*, simply misstates the law. In *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), this Court stated, in a footnote, that "a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect." *id.* at 436, n.13. In the same opinion, however, the Court emphasized the limited nature of this principle:

> In a conspiracy, two different types of intent are generally required — the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy. See W. LaFave & A. Scott, *Criminal Law* 464-465 (1972). *Our discussion here focuses only on the second type of intent.*

Id. at 443, n. 20 (emphasis added). Since this case deals with the standard governing the sufficiency of the evidence of the "intent to agree" or to participate in a conspiracy,* neither *United States Gypsum* nor the other cases relied on by Hydrolevel provide the slightest support for the panel's conclusion that par-

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(Footnote continued from previous page)

letter. *Id.* Second, Hydrolevel's suggestion that ASME actively participated in the unauthorized acts of its agents is also inconsistent with the panel's conclusion that its unwitting role in the issuance of the April 1971 letter was its "sole contribution to the conspiracy;" indeed, the panel tacitly accepted (as it must) ASME's argument that no one at ASME had any knowledge of the scope of Hardin and James' disloyal acts until long after they had been committed and corrected.

*In its Brief of Opposition, Hydrolevel asserts that "ASME candidly acknowledges that there existed a conspiracy to restrain trade *and to monopolize*, as found by the jury in this case, and that the ASME participated in this conspiracy." H. Br.Opp. at 5. This statement is absolutely false. The focus of ASME's entire argument in both the trial court and in the Court of Appeals was that there was no evidence that ASME knowingly and intentionally participated in *any* conspiracy.

ticipation in an antitrust conspiracy can be based exclusively on the unauthorized, disloyal acts of volunteer members who intended only to benefit themselves and a third party.

In summary, Hydrolevel has raised no valid reasons why ASME's Petition for a Writ of Certiorari should not be granted.

CONCLUSION

In view of the foregoing, and for the reasons stated in ASME's Petition and the fifteen *amicus curiae* briefs submitted in support thereof, ASME's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HAROLD R. TYLER, JR.
30 Rockefeller Plaza
New York, New York 10112
(212) 541-4000

Attorney for The American Society of Mechanical Engineers, Inc.

Of Counsel:

RICHARD D. PARSONS
FREDERICK T. DAVIS
STEVEN C. CHAREN

PATTERSON, BELKNAP, WEBB & TYLER
30 Rockefeller Plaza
New York, New York 10112

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AMICUS CURIAE BRIEF OF THE ACCREDITATION BOARD FOR ENGINEERING AND TECHNOLOGY INC., IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MICHAEL D. BROWN
Attorney for
The Accreditation Board for Engineering and Technology, Inc.
1370 Avenue of the Americas
New York, New York 10019
(212) 489-0220

Of Counsel:

HOWARD B. PREBANT
STEIN SIMPSON ROSEN & OHRENSTEIN
1370 Avenue of the Americas
New York, New York 10019

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Preliminary Statement

The Accreditation Board for Engineering and Technology, Inc. ("ABET") is a forty-eight year old not-for-profit corporation organized and operated exclusively for scientific educational and charitable activities in the public interest. During the course of its existence, ABET (and its predecessor organizations) has served the public by assisting in the evaluation and development of better educational programs for the engineer, engineering technologist and engineering technician in the colleges and universities of this country. ABET is recognized by the U.S. Commissioner of Education and the Counsel on Post-Secondary Education as the sole agency responsible for the accredita-

tion of educational programs leading to degrees in engineering. ABET accreditation is accepted by the National Bureau of Engineering Registration, the National Counsel of Engineering Examiners and by virtually all of the state licensing boards.

The scope and significance of ABET's activities can readily be seen from the fact that over the past three years ABET engineering accreditation volunteer teams visited, reviewed, studied, commented upon and accredited one hundred sixty-nine schools and six hundred eighty-three engineering programs. Further, the volunteer teams formally reported on one hundred forty-seven schools and programs. In the same period, ABET's technology accreditation volunteer teams* visited, studied, and evaluated one hundred sixty-three schools and five hundred thirty-three programs and formally reported on one hundred seven schools and programs. All of these activities were accomplished through the efforts of volunteers.

Based upon the investigation, analysis and expertise of these volunteers, ABET was able to provide invaluable assistance and direction to engineering and technological institutions in developing curricula and other educational programs to advance the art and science of engineering and to enable the educational institutions of this country to maintain a high level of quality in engineering and technological education with a view towards the promotion of the public welfare through the development of a better educated engineer, engineering technologist, and engineering technician.

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* Because of the difference in courses leading to an engineering degree and those leading to the graduation of technicians and technologists, two categories of review teams have been developed with appropriate criteria for accrediting the respective programs.

ABET has been fortunate in the past forty-eight years of its existence to be able to rely upon volunteers for virtually all of its activities. If it were not for these volunteers, ABET's programs, if carried out at all, could only be done at great cost for if ABET were required to purchase services comparable to the talents and abilities of the ABET volunteers the cost would indeed be staggering.

Unfortunately, through its decision in *Hydrolevel Corporation* v. *The American Society of Mechanical Engineers**, the United States Court of Appeals for the Second Circuit has, by its failure to define with precision the extent to which a charitable organization may, if at all, be responsible for the unauthorized and unrelated acts of its volunteers, threatened the future of the volunteer programs of ABET and those of other non-profit scientific, educational and charitable organizations providing important services to the public.

Statement of the Case

The question presented by the instant Petition is whether, or to what extent, a not-for-profit charitable corporation may be held liable for treble damages under the antitrust laws for the improper and wholly unauthorized acts of volunteers who, totally unbeknownst to such corporation, sought to benefit their own commercial employers at the expense of a competitor. In deciding that a non-profit membership corporation may be held liable for treble damages for the acts of disloyal volunteers who acted without authority and against their principal's interests, the lower court has created uncertainty and confusion as its ruling is entirely inconsistent with prior decisions of this Court, other circuits, and with the long established public policy

* Docket Nos. 79-7254 and 79-7260, decided November 24, 1980.

of encouraging the efforts of non-profit associations serving the public interest through the work of volunteers. Accordingly, this *amicus curiae* brief is submitted to address this important issue of public policy.

The Facts

The facts of this case have been presented at length in ASME's Petition and are adopted for the purposes of this brief.

Reasons for Granting the Writ

If the confusion created by the decision below is left to stand, many, if not all, of the services of not-for-profit corporations, which of necessity rely upon the work of volunteers for the quality and scope of their activities, will be severely reduced, if not permanently discontinued. The lack of precision with which the lower court has defined the standard of care to which a charitable organization will be held for the unauthorized acts of its volunteers will create a situation in which volunteers can act only under the most stringent and restrictive of conditions, which would discourage volunteers from offering their services and severely restrict and limit the activities of these charitable organizations which have, for half a century, served the public interest.

POINT ONE

The Decision Below Creates a Rule of Law That Is Against Long Established Public Policy and Will Have a Disastrous Effect on Non-Profit, Voluntary Membership Organizations.

The decision of the Second Circuit has created new uncertainties in the concept of vicarious liability under the antitrust laws. In imposing liability on the non-profit corporate principal, the lower court seemed to base the imposition of liability not only on the act of an agent acting under "apparent authority", but also on the absence of a "suitable precaution to avoid the antitrust violations." * However, by imposing such liability on this rationale, the lower court has apparently disregarded the principle established by this Court that participation in a conspiracy requires, at the least, a "unity of purpose or a common design and understanding, or a meeting of minds in an unlawful agreement." *American Tobacco Co.* v. *United States,* 328 U.S. 781, 810 (1946). While corporations have long been held "responsible for the wrongs committed by its agents in the course of its business", this Court has required that before a corporation may be held liable for the acts of its agents ". . . it must be shown that (the act complained of) is in the business of the corporation." *United Mine Workers of America* v. *Coronado Coal Co.,* 259 U.S. 344, 395 (1922).

Indeed, in applying the ruling of *Coronado Coal* and explaining the rationale for holding a corporation criminally liable for the acts of its agents, the Ninth Circuit Court of Appeals has noted that antitrust violations are usually motivated by a desire to enhance profits; commonly involve

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* Opinion of Court of Appeals in *Hydrolevel Corporation* v. *ASME,* Petition of ASME at A-15.

large, complex, and highly decentralized corporate business enterprises; and more often than not, involve the implementation of basic policy decisions over an extended period of time. *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1006 (9th Cir. 1972), *cert. den.* 409 U.S. 1125 (1973).

By overlaying the existing rule of vicarious liability with a theory of "apparent authority" to cover unrelated acts of agents, the Court of Appeals has not only run afoul of the decision by this Court in *Coronado Coal, supra,* but has imposed treble damage antitrust liability on a corporation whose policies are not only *not* profit oriented but whose very essence as a not-for-profit § 501(c)(3) tax exempt corporation is predicated upon the performance of scientific, educational and charitable services *in the public interest.* In sharp contrast to the decision in *Hilton Hotels, supra,* where the Ninth Circuit recognized that vicarious liability of a corporation was justified by the fact that antitrust violations are usually the result of the implementation of basic policy decisions, the acts here involved were not the result of basic policy decisions, but were, in fact, the result of a total and unauthorized perversion of the basic policies of the corporate principal.*

The wisdom in restricting the imposition of corporate liability to acts of agents which are either expressly authorized or at least taken to advance the purposes of the corporate principal is readily demonstrated by the compatibility of such principals with the long established policy

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* Indeed, in holding the Hilton Hotel Corporation liable for the act of its agent, the Ninth Circuit specifically noted that:

> "A purpose to benefit the corporation is necessary to bring the agent's acts within the scope of his employment." *Standard Oil Co.* v. *United States*, 307 F.2d 120, 128-129 (5th Cir. 1962).

In the instant case, it is conceded that the volunteer-agents had no intention of benefiting ASME and, in fact, did not benefit ASME by their acts.

of encouraging the work of not-for-profit membership corporations. While the very nature of these organizations compels them to rely on the work of volunteers, it has also allowed them to perform important high quality public services at no cost to the public. Indeed, the services provided to society by non-profit membership corporations are simply too many to enumerate in this brief. For example, the very code which is at the heart of the instant case has been established through the efforts of volunteers and has been responsible for the virtual elimination of heating boiler explosions. The contributions of non-profit membership corporations, however, go much beyond the engineering societies—bar associations, medical associations, accountants' organizations and community planning boards, to name just a few, have historically mobilized billions of dollars of manpower and talent for the benefit of the general public. These many associations have played important roles in the dissemination of information, improving public safety, product reliability, and maintaining high educational standards for the colleges and universities of this country.

If ABET, its member societies and other non-profit organizations are forced to choose between exposing themselves to the devastating consequences of treble damage antitrust liability or sharply restricting the activities of their volunteers, with the inevitable diminution of services rendered to the public, the choice is clear—services will be cut back. The consequences to American society of such a decision will be far reaching. We have historically opted to have voluntary non-profit associations assist the government in certain areas. Do we now wish to turn back those responsibilities to government? In an age of increasing reliance on engineering and technology, do we wish to have an already over-burdened and under-staffed government

assume the difficult and costly responsibility for promulgating and interpreting codes and standards or evaluating and accrediting educational institutions? Clearly, society has in the past been well served by allowing non-profit charitable, educational and scientific organizations to discharge these responsibilities—all through the acts of volunteers.

We do not propose that non-profit organizations be immune from suit. Indeed, this Court has previously articulated a perfectly workable rule which recognizes the need to encourage volunteers to contribute their services on the one hand while holding such organizations properly accountable for the acts of their volunteers taken on behalf of the organization and in furtherance of its activities. In the second *Coronado Coal* case, this Court in applying what we believe to be the sounder rule, refused to hold a union liable for acts encouraged by its president and held that:

> "In our previous opinion we held that a trades-union, organized as effectively as this United Mine Workers' organization was, might be held liable, and all its funds raised for the purpose of strikes might be levied upon to pay damages suffered through illegal methods in carrying them off; *but certainly, it must be clearly shown in order to impose such a liability on an association of 450,000 men that what was done was done by their agents in accordance with their fundamental agreement of association.*" *Coronado Coal* v. *United Mine Workers of America*, 268 U.S. 295, 304 (1925) (emphasis added).

By transposing the test of "apparent authority" to the area of non-profit charitable organizations which must rely on hundreds of volunteers for their daily activities, the lower court has, in our view, unwisely and inequitably imposed an unnecessary and potentially devastating burden on charitable organizations.

CONCLUSION

For the foregoing reasons, the Petition for a *Writ of Certiorari* should be granted.

Respectfully submitted,

MICHAEL D. BROWN
1370 Avenue of the Americas
New York, New York 10019
(212) 489-0220

Attorney for
The Accreditation Board for Engineering and Technology, Inc.

Of Counsel:

HOWARD B. PRESANT
1370 Avenue of the Americas
New York, New York 10019

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MICHAEL D. BROWN
Attorney for
The American Association of Engineering Societies, Inc.
1370 Avenue of the Americas
New York, New York 10019
(212) 489-0220

Of Counsel:

HOWARD B. PRESANT
STEIN SIMPSON ROSEN & OHRENSTEIN
1370 Avenue of the Americas
New York, New York 10019

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AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION OF ENGINEERING SOCIETIES IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Preliminary Statement

The American Association of Engineering Societies, Inc. ("AAES") is a non-profit membership corporation organized solely for scientific, educational and charitable activities in the public interest. As an association enjoying tax exempt status under §501(c)(3) of the Internal Revenue Code, the sole function of AAES is to serve the public by helping to develop an understanding of the technological considerations which have increasingly become part of various public policy decisions. By galvanizing the diverse expertise of its more than 38 member societies representing approximately 850,000 engineers, AAES has come to play an increasingly active role in discharging the re-

sponsibilities of engineers to advise the public and elected officials on technology and related issues of the day.

For more than forty (40) years, AAES,* its predecessor organizations, and its constituent societies have fulfilled their public interest work at no cost to the public through the "exploitation" of the talents of thousands of dedicated volunteers. Now, due to the decision of the United States Court of Appeals for the Second Circuit in *Hydrolevel Corporation* v. *The American Society of Mechanical Engineers*,** the ability of AAES, its member societies and other non-profit membership corporations to offer these increasingly important services to the public has been called into question.

While Petitioner, the American Society of Mechanical Engineers ("ASME"), has a direct pecuniary interest in the outcome of the *Hydrolevel* case, AAES and the other non-profit societies that make up its membership have a transcending interest in the decision of this Court to grant or refuse ASME's Petition for a Writ of Certiorari—the ability of non-profit membership corporations to continue to utilize the services of volunteers to perform their public interest work.

Statement of the Case

The narrow question presented by the instant Petition is whether, or to what extent, ASME may be held liable for treble damages under the antitrust laws for the improper and wholly unauthorized acts of two volunteers who, totally

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* In December, 1979, the Engineer's Joint Council ("EJC") changed its name to AAES. EJC had previously been serving the public for more than forty (40) years and enjoyed tax exempt status since 1961.

** Dkt. Nos. 79-7254 ando 79-7260, decided November 24, 1980.

unbeknownst to ASME but using ASME procedures, sought to benefit their own commercial employers at the expense of a competitor. In deciding that a non-profit membership corporation may be held liable for treble damages for the acts of disloyal volunteers who acted without authority and against their principal's interests, the lower court has, in our judgment, promulgated a sweeping rule of law that is not only at odds with prior decisions of this Court and other courts of appeal, but is entirely inconsistent with the long established public policy of encouraging the efforts of non-profit associations serving the public interest through the work of volunteers. Accordingly, this *amicus curiae* brief is submitted solely to address this important issue of public policy.

The Facts

The facts of this case have been presented at length in ASME's Petition and are adopted for the purposes of this brief.

Reasons for Granting the Writ

Simply stated the decision below if left to stand unexplained, will have a profound chilling effect on many, if not all, non-profit membership corporations which, of necessity, rely in good faith upon the work of their many volunteers. By ruling that a non-profit membership corporation may, under certain unspecified circumstances, be held vicariously liable for the unauthorized acts of its volunteer-agents, even where the acts at issue are taken without prior knowledge or approval and where they are not taken to advance the interests of the membership corporation, the Court of Appeals has created a "sword of Damocles" (the spector of treble damage liability) which is so threatening that

many such public service organizations may simply not be able to afford the risk of continuing to utilize the services of volunteers and will, therefore, have to discontinue rendering invaluable services to the public.

POINT ONE

The Decision Below Creates a Rule of Law That Is Against Long Established Public Policy and Will Have a Disastrous Effect on Non-Profit, Voluntary Membership Organizations.

While holding that a non-profit membership corporation may be held liable under the antitrust laws for acts of volunteers which are neither authorized, intended to benefit the organization or even consistent with the corporation's purposes, the Court of Appeals has, in effect, made these public interest corporations "insurers" of the good faith of their volunteers. Since these non-profit organizations must rely primarily on the work of volunteers, this ruling, which is not only inconsistent with prior decisions of this Court and of other courts of appeal, if left to stand, will do nothing less than require non-profit corporations such as AAES and the nearly 850,000 engineers represented by its member societies to cut back on the broad spectrum of services they have traditionally provided to our society. Clearly, this decision extending the doctrine of vicarious liability and holding for our society these important public policy considerations should not go unreviewed by this Court.

As stated, the decision by the Second Circuit has broken new ground in expanding the concept of vicarious liability under the antitrust laws. However, by imposing liability on corporate principals for the acts done by an agent under

his "apparent authority" the lower court has disregarded the basic principle long ago enunciated by this Court that participation in a conspiracy requires, at the least, a "unity of purpose or a common design and understanding, or a meeting of minds in an unlawful agreement." *American Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946). While corporations have long been held "responsible for the wrongs committed by its agents in the course of its business", this Court has required that before a corporation may be held liable for the acts of its agents ". . . it must be shown that (the act complained of) is in the business of the corporation." *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U.S. 344, 395 (1922).

Indeed, in applying the ruling of *Coronado Coal* and explaining the rationale for holding a corporation criminally liable for the acts of its agents, the Ninth Circuit Court of Appeals has noted that antitrust violations are usually motivated by a desire to enhance profits; commonly involve large, complex, and highly decentralized corporate business enterprises; and more often than not, involve the implementation, over an extended period of time, of basic policy decisions. *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1006 (9th Cir. 1972), *cert. den.* 409 U.S. 1125 (1973).

By extending the rule of vicarious liability to cover acts done by agents under "apparent authority", the Court of Appeals has not only run afoul of the decision by this Court in *Coronado Coal, supra*, but has imposed treble damage antitrust liability on a corporation whose policies are not only *not* profit oriented but whose very existence as a tax exempt "501(c)(3)" membership corporation rests upon its performance of scientific, educational and charitable services *in the public interest*. In sharp contrast to the decision in *Hilton Hotels, supra*, where the Ninth Circuit

recognized that vicarious liability of a corporation was justified by the fact that antitrust violations are usually the result of the implementation of basic policy decisions, the acts here involved were not the result of basic policy decisions, but were, in fact, the result of a total and unauthorized perversion of the basic policies of the corporate principal.*

The case for restricting the imposition of corporate liability for those acts of agents which are either expressly authorized or at least taken to advance the purposes of the corporate principal is clear with regard to the instant matter. ASME, AAES and other non-profit membership corporations must by reason of their charters and tax exempt status limit their activities to scientific, educational and charitable functions. While the very nature of these restrictions compels these organizations to rely on the work of volunteers, it has also allowed them to perform important public services at no cost to the public. For example, the very code which is at the heart of the instant case has been established through the efforts of volunteers and has been responsible for the virtual elimination of heating boiler explosions.

Other services provided to society by non-profit membership corporations are simply too many to enumerate. Not only does AAES utilize the services of more than 600 individual volunteers to staff its more than forty (40) committees, but the constituent societies of AAES employ the

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* Indeed, in holding the Hilton Corporation liable for the act of its agent, the Ninth Circuit specifically noted that:

> "A purpose to benefit the corporation is necessary to bring the agent's acts within the scope of his employment." *Standard Oil Co.* v. *United States*, 307 F.2d 120, 128-129 (5th Cir. 1962).

In the instant case, it is conceded that the conspirators had no intention of benefiting ASME.

services of thousands of volunteers, all expressly limited by the charters of member organizations to educational, scientific or charitable activities. The contributions of non-profit membership corporations, however, go much beyond those of the engineering societies—bar associations, medical associations, accountants organizations and community planning boards, to name just a few, have historically mobilized billions of dollars of manpower and talent for the benefit of the general public. These many associations have played important roles in improving public safety and product reliability, maintaining high ethical and professional standards for the various professions and providing for the dissemination of information necessary to the increasing quality of our lives.

If AAES, its member societies and other non-profit membership corporations are forced to choose between exposing themselves to the devastating consequences of treble damage antitrust liability or cutting back on the utilization of volunteers, with the concommitant diminution of services rendered to the public, the choice is clear—services will have to be cut back. The consequences to American society of such a decision are profound indeed. We have historically opted to have voluntary non-profit professional associations monitor the standards of admission to the practice of many of our professions. Do we now wish to turn back those responsibilities to government? In an age of increasing reliance on engineering and technology, do we wish to have the government undertake the herculean and costly responsibility for promulgating and interpreting codes and standards? Clearly, society has in the past been well served by allowing the private sector to discharge these responsibilities—all through the acts of volunteers.

This is not to say that non-profit organizations should be immune from suit. Quite the contrary. Each of these or-

ganizations have responsibilities to monitor reasonably the activities of its volunteers. Nevertheless, it is simply unrealistic to expect these organizations to detect every possible disloyal volunteer before he acts. What is necessary is a balancing of priorities. Indeed, this Court has previously articulated a perfectly workable rule which recognizes the need to foster volunteerism on the one hand while holding such organizations properly accountable for acts of their volunteers taken to advance the interests of the organization. Thus, in the second *Coronado Coal* case, this Court refused to hold a union liable for acts encouraged by its president and held that:

> "In our previous opinion we held that a trades-union, organized as effectively as this United Mine Workers' organization was, might be held liable, and all its funds raised for the purpose of strikes might be levied upon to pay damages suffered through illegal methods in carrying them off; *but certainly, it must be clearly shown in order to impose such a liability on an association of 450,000 men that what was done was done by their agents in accordance with their fundamental agreement of association.*" *Coronado Coal* v. *United Mine Workers of America*, 268 U.S. 295, 304 (1925) (emphasis added).

This principle applied to a labor union, that a large organization may only be held responsible for acts taken to benefit the organization, should be applied to non-profit membership corporations. As in the case of labor unions, non-profit membership corporations serve important public functions which must be recognized by our courts. By applying the test of "apparent authority" to the instant case, the lower court has, in our view, unwisely failed to recognize the need to balance these competing interests.

CONCLUSION

For the foregoing reasons, the Petition for a *Writ of Certiorari* should be granted.

Respectfully submitted,

MICHAEL D. BROWN
1370 Avenue of the Americas
New York, New York 10019
(212) 489-0220

Attorney for
The American Association of Engineering Societies, Inc.

Of Counsel:

HOWARD B. PRESANT
1370 Avenue of the Americas
New York, New York 10019

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IN THE

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Petitioner,

v.

HYDROLEVEL CORPORATION,
Respondent.

BRIEF AMICUS CURIAE OF AMERICAN CHEMICAL SOCIETY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

WILLIAM J. BUTLER, JR.
FRANK M. NORTHAM
HANSON, O'BRIEN, BIRNEY
AND BUTLER
888 Seventeenth St., N.W.
Washington, D.C. 20006
(202) 298-6161
Attorneys for Amicus Curiae,
American Chemical Society

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PRELIMINARY STATEMENT

The American Chemical Society (hereinafter "ACS" or "the Society") submits this brief amicus curiae in support of the petition for certiorari filed by the American Society of Mechanical Engineers, Inc. (hereinafter "ASME"). All parties to this suit have given ACS written consent to the filing of this brief. Copies of such consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS

The American Chemical Society is a non-profit, scientific, and educational organization with a membership of approximately 120,000 chemists and chemical engineers, reflecting a broad spectrum of academic, governmental, and industrial

professional pursuits. The Society is the largest single organization for chemists and chemical engineers in the United States and the world's largest organization devoted to a single science.

Similarly to ASME, the Society is not a trade association; rather, it is a membership organization exempted from federal taxation under Section 501(c)(3) of the Internal Revenue Code. Originally incorporated in the state of New York, ACS received a federal charter by Act of Congress in 1937. The objects of the Society, as set forth in Section 2 of its charter, are

> ... to encourage in the broadest and most liberal manner the advancement of chemistry in all its branches; the promotion of research in chemical science and industry; the improvement of the qualifications and usefulness of chemists through high standards of professional ethics, education, and attainments; the increase and diffusion of chemical knowledge; and by its meetings, professional contacts, reports, papers, discussions, and publications, to promote scientific interests and inquiry, thereby fostering public welfare and education, aiding the development of our country's industries, and adding to the material prosperity and happiness of our people.

In furtherance of these goals, the Society has become a leading publisher of scientific journals in chemical fields and holds regular scientific meetings to promote the dissemination and exchange of chemical and scientific information. Additionally, however, and of greater importance to the instant case, ACS maintains numerous divisions and committees of the Society which are dedicated to the promotion and improvement of specific fields of chemistry and chemical engineering. Drawing on the expertise of volunteers from all sectors (academia, private industry, and government), the Society, its divisions, and committees frequently formulate guidelines or, in some instances, standards for the betterment of the chemical profession and chemical education which redound to the benefit of the public.

As is the case with the codes and standards developed and interpreted by ASME, the guidelines and standards formulated

by ACS are "voluntary," but they sometimes are incorporated into or utilized in federal, state, and local laws, regulations, and ordinances. Among ACS activities which result in the formulation of standards or guidelines are the following:

ACS Specifications for Analytical Reagents—

The ACS Committee on Analytical Reagents establishes and publishes a book of standards of quality for reagents to be used in analytical work, designating maximum amounts of given impurities which may be contained in specific reagents. Manufacturers of chemicals greatly value the right to label their reagents as ACS approved.

Setting Chemical Nomenclature—

The ACS Committee on Nomenclature establishes and publishes standardized nomenclature for the identification of chemical materials, properties and reactions. The ACS nomenclature is generally accepted and utilized by academia, private industry and the government. Several government regulatory agencies utilize the ACS nomenclature in identifying particular chemical substances.

Accreditation of Chemistry Departments—

ACS evaluates chemistry departments at colleges and universities and formally approves those which satisfy its guidelines.

Health and Safety—

ACS publishes a chemical laboratory safety manual, guidelines for the authors of laboratory text books, guidelines for chemistry faculty teaching handicapped students, and health and safety guidelines for chemistry teachers.

Employer/Employee Relations—

ACS has promulgated and published "Professional Employment Guidelines" delineating duties and responsibilities of employer to employee and vice versa in private industry.

Additionally, ACS works closely with the federal government (both by contract and voluntarily) in formulating, interpreting, and evaluating governmental regulations impacting on chemists, the chemical industry, and the public. For example, in commenting on proposed OSHA regulations concerning hazardous chemicals as they affect research and development laboratories, ACS surveyed over 1500 entities and provided the survey results to OSHA.

All the above programs and activities primarily are carried out by members of ACS who have volunteered their time to serve on the committees vested with the responsibility to formulate and interpret standards and guidelines. Because of the large number of divisions, committees, and sub-committees maintained by ACS, it is not possible for ACS to monitor all the activities of these groups. ACS must rely on the good faith, dedication, and professionalism of the members who volunteer to serve on such bodies. While the structure and procedures of the ACS committee system make it unlikely that any individual or group of individuals could intentionally misuse their positions in order to damage another individual or entity, the ASME experience proves that it is not impossible.

It is the position of the American Chemical Society that to hold an organization liable for violation of the antitrust laws where its agent acted without the organization's knowledge and without any intention to benefit the organization is contrary to the case law established by this Court and is contrary to public policy.

QUESTIONS PRESENTED AND STATEMENT OF THE CASE

ACS adopts the questions presented and statement of the case as set forth in ASME's petition for certiorari.

ARGUMENT

At the outset it should be emphasized that the ACS strongly supports and adopts the position of ASME. ACS believes that ASME's petition for certiorari persuasively and accurately describes the background of this case, delineates the errors and legal misinterpretations committed both by the trial court and the appellate court, and forcefully presents the arguments and cases demonstrating that the Second Circuit's application of the apparent authority doctrine to the facts of this case to establish liability for antitrust violations is insupportable under the decisions of this Court and the other Circuits. The ACS wishes to elucidate further for this Court the deleterious effects on non-profit voluntary organizations and the detriment to the public which would result if the Second Circuit panel's decision is permitted to stand.

Since medieval times, with the advent of the merchant guilds and craft guilds, voluntary associations have played an important role in organized societies, and this especially has been true in the United States. As early as 1835, Alexis de Tocqueville was led to comment on the propensity of Americans to organize in voluntary associations:

> Americans of all ages, all conditions, and all dispositions constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds, religious, moral, serious, futile, general or restricted, enormous or diminutive. The Americans make associations to give entertainments, to found seminaries, to build inns, to construct churches, to diffuse books, to send missionaries to the antipodes; in this manner they found hospitals, prisons, and schools. If it is proposed to inculcate some truth or to foster some feeling by the encouragement of a great example, they form a society. Wherever at the head of some new undertaking you see the government in France, or a man of rank in England, in the United States you will be sure to find an association.

A. de Tocqueville, *Democracy in America* (1835). Such associations are formed for a multitude of purposes and, whether they are professional societies, trade associations or 501(c)(3) organizations, they perform vital functions which contribute to the public interest and welfare. The voluntary efforts of such organizations result in an enhanced interchange of information among specialists in the professions and in industry, education of the public and consumers as to safety and reliability of products, supervision and maintenance of high ethical and professional standards, and improvement of the quality of goods and services utilized by industry and the public. None of these results could be achieved were the individual members of these organizations not willing to dedicate their time and expertise voluntarily to working with their peers in attempting to improve the products (be they goods or services) of their particular pursuits.

Among the many activities performed by professional and technical organizations, standardization and certification programs have long been recognized not only for their benefit to association members but also to the public. "[Associations and their members] have engaged in many activities to which no exception is taken by the government, and which are admittedly beneficial to the industry and to consumers; such as ... the standardization and improvement of its product." *Maple Flooring Mfrs. Ass'n.* v. *United States,* 268 U.S. 563, 566 (1925). Standards programs which, rather than seeking to establish uniformity among products, emphasize maintenance of the quality and grade of products also have been consistently supported by the judiciary and by the Federal Trade Commission. See, *United States* v. *College of American Pathologists,* 1969 Trade Cas. Par. 72,825 (N.D. Ill. 1969); Advisory Opinion to the American National Standards Institute, Inc., CCH Trade Reg. Rep. Par. 1718.20 (FTC 1971).

Were it not for the voluntary efforts of trade, technical and professional associations in creating standardization and certification programs, many such programs would not exist, for neither private industry nor the government has the human resources or the money to assume the burden of establishing

and maintaining such programs. For example, in 1964 there were 13,600 nationally-used standards in effect, of which more than 3,000 required annual revision. Wachtel, *Products Standards and Certification Programs,* 13 ANTITRUST BULL. 1 (1968); Lange, *Steps to American Standards,* AMERICAN MANAGEMENT 6 (Aug. 1965). As of 1976 approximately 25,000 standards had been developed by voluntary organizations during the preceding ten years; it was estimated that tens of thousands of individuals, working with some 180 standards-producing organizations, had contributed to the support of such programs at an *annual* cost of over $250,000,000. Hagan, *In Defense of Voluntary Trade Product Standards,* MBA, April 1978. Thus "for government to undertake the responsibility for all this work would not only significantly increase the direct cost of government but would divert from their main occupations a significant portion of the nation's talented technicians." Wachtel, *supra* at 7.

Yet, if the decision below is permitted to stand, large numbers of voluntary organizations may find it necessary to abandon their standardization and certification programs rather than face the threat of potentially debilitating antitrust judgments such as that in the instant case. As previously stated, professional and technical organizations (especially 501(c)(3) organizations such as ACS and ASME) must rely on the expertise and services of volunteer members to carry out the organizations' activities. Necessarily, such volunteers may be associated with businesses whose economic interests may be affected by the organizations' activities. Under the Second Circuit's theory of vicarious liability in the context of federal antitrust laws, non-profit associations are made the guarantors of all acts of volunteer members, even where the acts of such members are contrary to the organization's goals, are done without the knowledge of the organization, and in fact are done solely with the intent of benefitting another entity.

The Second Circuit opined that ASME should be held liable because it had failed to create appropriate "internal review procedures" which would have prevented issuance of the erroneous interpretation letter. As ASME has pointed out, the letter was reviewed by the appropriate individuals within its

organization and, even had there been other review procedures, the ulterior purpose of the letter would not have been detected. No workable review procedure can be formulated which would prevent an unscrupulous member from utilizing his voluntary position in the organization to his own benefit. Virtually all association members who volunteer to serve on the committees and groups formed to carry out the association's activities do so out of dedication to the aims of the organization and out of a desire to contribute to the improvement of the products and services provided in their specialized fields. There may be a few such individuals who serve in order to advance their own interests, but to make non-profit associations strictly liable for all actions of such individuals (where the association has no knowledge of such actions) does not serve the public interest and does not comport with established law.

CONCLUSION

Since the first federal income tax in 1913, there have been exemptive provisions in the taxing statutes which specifically grant tax-exempt status to trade, technical, and professional associations. The exemptions granted were "made in recognition of the benefit which the public derives from corporate activities of the class named [in the exempting statutes]." *Trinidad* v. *Sagrada Orden de Predicadores*, 263 U.S. 578, 581 (1924). As emphasized above, standardization and certification activities of such voluntary associations not only benefit the public by improving the quality, uniformity, and safety of innumerable goods and services, but also constitute the performance of vital economic functions which neither private industry nor the government is properly equipped to perform. The Second Circuit's decision, by imposing potential treble damage liability on such associations for "unintentional participation" in the antitrust violations of others, threatens the continued maintenance of voluntary standards and certification programs to the detriment of the American public.

For the foregoing reasons, along with those set forth in the petition for certiorari, the American Chemical Society respectfully urges that ASME's petition for certiorari be granted.

Respectfully submitted,

WILLIAM J. BUTLER, JR.
FRANK M. NORTHAM
HANSON, O'BRIEN, BIRNEY
AND BUTLER
888 Seventeenth St., N.W.
Washington, D.C. 20006
Telephone (202) 298-6161

Attorneys for Amicus Curiae,
American Chemical Society

Office-Supreme Court, U.S.
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On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF AMERICAN CONCRETE INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ROBERT P. GRIFFIN
Attorney For American Concrete Institute
2500 Detroit Bank & Trust Building
Detroit, Michigan 48226
Telephone: 313-963-6420

Of Counsel:
MILLER, CANFIELD, PADDOCK
AND STONE
GEORGE E. PARKER III
LARRY J. SAYLOR
2500 Detroit Bank & Trust Building
Detroit, Michigan 48226

Interstate Brief & Record Co., Wurlitzer Bldg., 1509 Broadway, Detroit, MI 48226
(313) 962-8745

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BRIEF OF AMERICAN CONCRETE INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMERICAN CONCRETE INSTITUTE AS AMICUS CURIAE

The American Concrete Institute ("ACI"), like the petitioner American Society of Mechanical Engineers ("ASME"), is a nonprofit scientific and educational society engaged, among other things, in promulgating standards. ACI's interest in the present matter is based on its concern that, unless reversed, the implied agency standard for antitrust liability adopted by the panel of the Second Circuit will seriously jeopardize the activities

of ACI and similar institutions, and will unduly constrain their ability to provide service to the public. ACI believes that the reasoning of the panel is unsound as a matter of law and unwise as a matter of public policy. This brief is filed by consent of the parties in accord with Supreme Court Rule 36.1, and signed consents are filed herewith.

The American Concrete Institute is a nonprofit scientific and educational society, organized in 1905, with the declared purpose of representing the interests of users of concrete. While some materials producers are members of ACI, their support is minimal and the bulk of its over 15,000 members come from user groups: public agencies, engineers, architects, owners, contractors, educators, and other specialists interested in the design, construction, and maintenance of concrete structures.

ACI publishes three periodicals and numerous special publications devoted to the dissemination of information related to these purposes. ACI also conducts two annual conventions and various meetings and carries on its activities through local chapters located throughout the United States and elsewhere in the world.

Like ASME, one of ACI's most important activities is the development of standards for safe design, construction and maintenance. There are currently over thirty ACI standards in effect concerning virtually every area of concrete practice. ACI standards sometimes take the form of requirements for concrete design or construction intended for incorporation verbatim or by reference into building codes, specifications, or contracts. They may also be in the form of recommended practices which present the best practice in a given field from which a user may prepare specifications. Most ACI standards have been adopted or incorporated by

reference by state and local government and contracting parties. Both ACI and ASME are accredited by the American National Standards Institute ("ANSI"), and their standards are developed through consensus procedures approved by ANSI.

Like ASME, ACI depends heavily upon member volunteers to staff committees to carry out its activities. Under its eighteen-member board of direction are eighteen standing committees, including the technical activities committee, standards board, and educational activities committee. Each standing committee is appointed by the board of direction, acts as the agent of the board and is responsible to the board for performance of functions assigned to it.

In addition to the board and standing committees, the activities of ACI are accomplished through over 100 educational and technical committees made up of over 2000 volunteers drawn from the membership of ACI. These committees are authorized by the board but report to the educational activities and technical activities committees. The actions of all committees are subject to the review and approval of the board of direction.

The educational committees are responsible for the dissemination of information for educational programs, seminars, and workshops. The technical committees are assigned specific tasks relating to dissemination of information on improvement of the design, construction, manufacture, use and maintenance of concrete structures and products. Proposals for the adoption, amendment or repeal of ACI standards originate in the appropriate technical committee.

The specifications review committee, a committee reporting to the technical activities committee, is responsible for the specifications programs. This committee plans the programs and reviews the finished work of the technical committees for both proper

specifications form and technical content. The specifications review committee is responsible for coordinating all specifications, ensuring that they are kept current, and encouraging the use of ACI specifications.

All proposed new standards or revisions to existing standards, including minority reports from sponsoring technical committees, are forwarded from the technical activities committee to the standards board. The standards board is responsible for matters of policy, procedure, and appeal pertaining to ACI standards. Its primary function is to verify that proper standardization procedures have been followed and to rule on matters of policy as related to standards. The standards board may by majority vote approve a proposed standard for publication and presentation to a convention for discussion or may return it with comments to the technical acitivities committee for reconsideration.

When formally adopted by a majority of the members voting by letter ballot, the codes, specifications, or recommended practices developed by the technical committees become ACI standards. The consensus-developed standards then become officially endorsed publications of ACI covering the many aspects of concrete practice.

ACI at present issues no formal interpretations of its standards. However, informal opinions regarding ACI standards have been rendered from time to time by ACI staff or members of the originating committee.

ARGUMENT

ACI submits that the decision of the Second Circuit panel was erroneous both as a matter of law and as a matter of public policy, and respectfully urges that this Court grant the present petition for a write of certiorari.

I.

THE CIRCUIT COURT ERRED AS A MATTER OF LAW.

ACI concurs with the petitioner's argument that the panel misconstrued the applicable law, and that the decision is inconsistent with previous decisions of this Court, previous decisions of other federal courts, and the Restatement (Second) of Agency. ACI will not burden the record with a lengthy recapitulation of arguments ably presented by petitioner. ACI would emphasize, however, that in *United Mine Workers of America* v *Coronado Coal Co.*, 259 U.S. 344, 393 (1922) and in *Coronado Coal Co.* v. *United Mine Workers of America*, 268 U.S. 295, 304 (1925), this Court squarely held that liability under the Sherman Act for acts of a third party are limited to cases of actual agency or ratification of the acts constituting the alleged violation. This standard is consistent with and indeed mandated by the well-settled rule that a conspiracy exists under Section 1 or Section 2 of the Sherman Act only where there are two or more conspirators who had a "unity of purpose or a common design or understanding" to cooperate to achieve a proscribed result. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213-14 (1951). Compare *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 443-46 &

nn. 19, 20 (1978); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946). In adopting an apparent agency theory, the Court of Appeals erroneously analogized Sherman Act conspiracy claims to the torts of defamation, interference with business relations, misrepresentation and fraud. This characterization ignores the fact that the question of agency is relevant only to determine whether the crucial element of conspiracy underlying the Section 1 and Section 2 violations exists. Apparent agency or negligent supervision cannot, as a matter of law, create an antitrust conspiracy between the purported principal and a third party whose actions it has not authorized, ratified, or benefited from.

The panel moreover erred in concluding that treble damages under the antitrust laws should be available on the basis of apparent agency. Broad theories of agency liability are inappropriate where punitive damages are automatically imposed by statute. *Asphalt Industries, Inc.* v. *Commissioner*, 384 F.2d 229 (3d Cir. 1967); *United States* v. *Ridglea State Bank*, 357 F.2d 495 (5th Cir. 1966).

Nor can the "victim" of the alleged conspiracy in the instant case, unlike plaintiffs in fraud or business tort cases, claim to have relied on any apparent agency of the ASME members involved. Indeed, the record shows that Hydrolevel did not even become aware of the letter in question until over eight months after that letter had been issued.

This case should be governed by the controlling authority of *Coronado Coal*. A writ of certiorari should be granted, and the order of the Circuit Court panel should be reversed on the issue of liability.

II.

THE COURT OF APPEALS PANEL ERRED AS A MATTER OF PUBLIC POLICY.

Like ASME, ACI is acutely aware of the disservice which the Court of Appeals opinion will do to the public interest. ACI and ASME are but two of many organizations which publish standards based on the expertise their members have gained as practitioners in the technical fields affected. Because of their members' expertise, these organizations are uniquely capable and qualified to develop and promulgate such standards. Indeed, there are virtually no other private groups or entities which would be capable of publishing standards in many of the areas concerned. In view of the large number of technical fields and the many types of specialized expertise involved, it would be impractical and uneconomic to expect federal, state and local governmental units to step into the breach which would be left if these organizations were forced to curtail their activities. Indeed, in the view of some, a further expansion of government in these areas would be inappropriate in its own right.

The importance to the public of the standards and related educational activities of organizations such as ACI and ASME cannot be overstated. ACI standards protect the health and safety of the public by providing structural safety and performance guidance for designers, educators, government and business for a broad range of concrete structures including buildings of all types, bridges, nuclear structures, sanitary engineering structures, and offshore concrete structures. They cover such topics as draft building codes; mixing, placing and handling of concrete; durability of concrete; and fatigue, corrosion and cracking of concrete, to mention but a few.

The impact of the Circuit Court decision on the activities of bodies such as ACI is potentially far-reaching and destructive. ACI must and does rely upon its members to staff its many committees to draft, modify and interpret its standards. ACI believes that it has a more than adequate set of review procedures, and that these procedures are consistently and carefully applied. However, any system can be abused by a willful and faithless person.* The possibility that the activities and review procedures of ACI and similar organizations could be second-guessed by litigants and courts and could form the basis for large monetary judgments and injunctive relief would have a profound chilling effect on ACI and on other similar groups and their activities.

Indeed, under the panel's ruling, technical and scientific societies such as ACI could be subjected to (or threatened with) antitrust liability for many activities other than publishing standards or interpretations. Liability could be premised on many other educational and informational activities which may cause competitive disadvantage to some party. For example, a speaker at a meeting or seminar sponsored by ACI or an author of an article published by ACI might make a comment unfavorable to a product or process which could be alleged to be part of a conspiracy to restrain trade. The Circuit Court ruling could threaten ACI with massive liability for such comments, even though they were not authorized or ratified by ACI, and even though any underlying conspiracy was unknown to ACI and acted to its detriment. As this Court well knows, the cost of defending against an antitrust claim is substantial, whatever their merits of the claim. The broad standard of agency adopted by the panel would increase the number of

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* If ACI activities are abused, the proper recourse for any injured party would be against the offending individuals and actual beneficiary.

such suits and would have a severe and unwarranted chilling effect on the many valuable activities of organizations such as ACI.

ACI submits that the proper standard for liability under Section 1 and Section 2 of the Sherman Act where a conspiracy involving an agent is alleged is the standard of actual agency or ratification recognized in the *Coronado Coal* decisions of this Court and the similar decisions of other courts that have considered the issue. Adoption of an implied agency theory would do a severe disservice to virtually every member of the public, all of whom benefit from the services of ACI and other voluntary scientific and educational organizations, while providing virtually no increased protection from anticompetitive injury.

CONCLUSION

For the reasons set forth herein and by the petitioner, the American Concrete Institute respectfully prays that the petition of the American Society of Mechanical Engineers for a writ of certiorari be granted, and that the decision of the Court of Appeals be reversed on the issue of liability.

Respectfully submitted,

ROBERT P. GRIFFIN
Attorney for American Concrete Institute
2500 Detroit Bank & Trust Building
Detroit, Michigan 48226
Telephone (313) 963-6420

Of Counsel:
MILLER, CANFIELD, PADDOCK
AND STONE
GEORGE E. PARKER III
LARRY J. SAYLOR
2500 Detroit Bank & Trust Building
Detroit, Michigan 48226

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No. 80-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., *Petitioner,*

v.

HYDROLEVEL CORPORATION, *Respondent.*

On A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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MEMORANDUM OF THE AMERICAN INSTITUTE OF MINING, METALLURGICAL, AND PETROLEUM ENGINEERS, INC., AS AMICUS CURIAE

GEORGE D. WEBSTER*
RICHARD H. MANSFIELD III
WEBSTER, CHAMBERLAIN & BEAN
1747 Pennsylvania Ave., NW
Suite 1000
Washington, D.C. 20006
(202) 785-9500
Attorneys for Amicus Curiae

**Counsel of Record*

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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MEMORANDUM OF THE AMERICAN INSTITUTE OF MINING, METALLURGICAL, AND PETROLEUM ENGINEERS, INC., AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The American Institute of Mining, Metallurgical, and Petroleum Engineers ("AIME"), of New York, founded in 1871, is a non-profit volunteer organization exempt from taxation under section 501 (c)(3) of the In-

ternal Revenue Code. The purpose of AIME is to disseminate knowledge of the arts and sciences involved in the production and use of minerals, metals, energy sources and materials. The AIME is the parent association of four constituent societies, each with its own board of directors. These societies are: the Society of Mining Engineers of AIME, the Metallurgical Society of AIME, the Iron and Steel Society of AIME, and the Society of Petroleum Engineers of AIME. Collectively, these groups have over 80,000 members, most of whom are engineers.

AIME's services to its members are somewhat different in nature than those offered by Petitioner to its members. ASME develops standards[1] and guidelines involving both consumer and commercial products and tools of the trade used by engineers and manufacturers. AIME, on the other hand, is more involved in disseminating information and professional knowledge to its members. Toward this end, AIME publishes books and professional journals and holds numerous professional meetings designed to inform members of new advances in various technological fields.

AIME is principally involved in providing a forum for the exchange of knowledge of techniques employed to recover the earth's minerals and energy resources and to converting them to useful products. The advances

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[1] The holding below is certain to have numerous adverse affects on voluntary membership associations involved in promulgating standards. A standard is a description published by an association, detailing in layman's terms certain characteristics of products. Standards are helpful both to consumers and manufacturers alike since they make available useful information concerning the safe use and construction of products. Such topics as strength, safety and performance are addressed in a typical standard.

made in past years in mineral recovery have been aided greatly by the activities of AIME. Without the research and technological advances achieved by the voluntary members of AIME, the United States energy production and mineral recovery could not have reached present levels. It is for this reason that AIME's services to mining, metallurgical and petroleum engineers are vitally important, not only in processing the earth's resources, but also in helping to ensure economic stability and energy self-sufficiency.

AIME is engaged in developing standards, but to a much lesser extent than is ASME. While ASME promulgates standards relating to the actual products and machinery used by mechanical engineers, manufacturers and consumers, AIME's few standards concern processes used to extract oil and minerals from the earth. For example, AIME has developed uniform standards for formulas used in resevoir engineering. These standards apply to symbols used by petroleum and mining engineers and enable a much more efficient yield of oil and gas when they are being produced from the underground reservoir.

The present case presents an unconventional and potentially harmful precedent as to the antitrust liability of professional associations. AIME and many other associations stand to suffer great losses both in the voluntary support of individual members and in the operation of services unless the panel's decision is reviewed and overturned. As the arguments which follow point out, there would be too many risks of liability involved in serving a professional organization if the reasoning of the Second Circuit is allowed to prevail. The AIME believes that its experience and comments on this case will provide this Court with helpful insight in addressing the issues raised.

INTRODUCTION AND SUMMARY OF ARGUMENT

The present case raises significant questions both as to the liability of professional associations for the unlawful acts of their agents, who, while acting within the scope of apparent authority, violate antitrust laws, and as to the meaning of such terms as "contract," "combination" and "conspiracy" as those terms apply to antitrust litigation.

The decision below promulgates a new basis upon which antitrust liability may be predicated and poses potentially disasterous consequences for professional associations which rely on the voluntary participation of their members. The limits of this new standard of liability will cast a shadow of uncertainty over the acts of professional associations.

How such a principle is to be applied or, indeed, whether it can logically be applied in antitrust litigation is an issue which calls for a determination from this Court. If the ruling of the Second Circuit is allowed to stand unscrutinized, the courts will become burdened with unnecessary litigation and voluntary associations and the industries and communities they serve will suffer. There seems little need to destroy the sound principles of actual agency in favor of less reliable rules advocating antitrust liability of innocent and "unintentional" participants.

ARGUMENT

I. This Court Should Grant Certiorari To Determine The Applicable Standard Of Liability Of A Professional Association Whose Members, Without The Knowledge Or Support Of The Association, And Without Intending To Benefit The Association, Conspire To Violate The Antitrust Laws.

Of great concern to incorporated and voluntary associations everywhere is this decision's impact on the ability of such organizations to function normally without fear of unfounded antitrust reprisals. Specifically, the Second Circuit's sweeping abandonment of traditional case law defining the conditions under which a voluntary association may be held liable for violations of the Sherman Act will undoubtedly require more judicial review before the meaning of this case becomes clear.

For decades, associations have relied on the premise that where an agent acts unlawfully without intending to benefit his principal, the principal cannot, without ratifying those acts, be held accountable for them. *See,* e.g., *United Mine Workers of America* v. *Coronado Coal Co.* 259 U.S. 344 (1922); *United States* v. *Hilton Hotels Corp.* 467 F. 2d. 1000 (9th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973). These decisions concur in their holding that there must exist some kind of actual authority on the part of, or benefit accruing to, the principal before liability can arise. An alternative requirement, as, for example, when an organization ratifies the unlawful act of one of its agents thereby condoning it, is based on sound and established agency principles. The panel now seeks, through a novel gloss on the law of agency, to change the liability standard to one of apparent authority whereby a principal would be liable for unlawful behavior of agents who act within the scope of authority

as determined by a third person. The panel's reasoning in reaching this result depends largely on seldom followed and narrow agency and tort precepts. According to the Second Circuit, the ruling case law in this area, including important decisions by this Court, ought now to be cast aside in favor of a standard which depends for its credibility on misapplied examples in the Restatement 2d of Agency and on one decision involving a bill of lading which has nothing whatever to do with antitrust law.

A rule of law establishing liability without fault in antitrust cases would call into question the very meaning of the requirement that those charged with violation of the Sherman Act must form a "conspiracy," "contract" or "combination." Numerous cases have held that where a conspiracy or combination exists, there must at least be a "unity of purpose" or "common design," *American Tobacco Co.* v. *United States* 328 U.S. 781 (1946); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.* 340 U.S. 211 (1951), or "*at least* the degree of criminal intent necessary for the substantive offense itself." *Ingram* v. *United States* 360 U.S. 672, 678 (1959). This Court has repeatedly held that unless concerted action by two or more parties exists, no contract, combination or conspiracy as required under Section One of the Sherman Act can be found, *Cement Mfrs. Protective Ass'n.* v. *United States,* 268 U.S. 588, 602-06 (concerted action not shown and no unlawful restraint accrued); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 144 (1968) (White, J., concurring). Thus, participation by two persons or parties is an essential element of a violation of the Sherman Act.[2]

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[2] This principle was followed in *United States* v. *Corn Derivatives Institute*, 1932-1939 Trade Cas.¶ 55,002 at 18 (N.D. Ill. 1932)

Under the Second Circuit's reasoning, an association such as AIME would be held accountable for antitrust violations if it did nothing to participate in a common design and did not perform a critical act with a specific intent of accomplishing that act. Liability would arise even if the association was without knowledge of the act and was incapable of benefitting from it. In short, associations would be capable of violating the antitrust acts without conspiring, contracting or forming a combination with anyone for that purpose. This curious principle will surely yield incongruous results since one man standing alone cannot be a conspirator.

The decision below seems all the more unaligned with both classical antitrust and agency theory in its determination that the professional association involved, ASME, was an unintentional participant in its volunteers' conduct. (A:26, 635 F. 2d at 131.) This means that at best, ASME might have been negligent. A theory of negligence is out of place in antitrust law.

Because of the treble damage aspect of the Sherman Act, standards of liability should not be lightly or confusingly applied unless there is a sound and logical basis behind such standards. To hold otherwise would subject innocent parties to the harshest of penalties.

II. There Presently Exists An Adequate Remedy For Third Persons Who Are Harmed By The Unlawful Acts Of Agents Purporting To Act On Behalf Of Their Principals.

For competitors injured by the acts of fellow competitors who are incidently officials of professional

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where the court held that "the words 'acting in concert' as used in this decree shall mean by mutual agreement, understanding, plan, device, or contrivance entered into or employed by any two or more defendants. . ."

associations, there presently exists an adequate remedy provided by the antitrust laws. In the case below, the agents acted to benefit not the American Society of Mechanical Engineers, but rather their own corporations. The sole remedy should be against the principal of the wrongdoers: their corporate beneficiaries. In this manner the purpose of the antitrust laws is more fully served. The public is not protected—indeed it is certainly harmed—where liability is imposed on innocent parties, especially where those parties are voluntary organizations existing to assist in keeping the market place safe. The remedy should be directed not at closing down or limiting the activity of such organizations but rather at punishing the parties responsible for the harm caused. Seen in this light, the panel's decision requires careful consideration by this Court.

III. The Court Should Grant Certiorari To Review The Restraint The Second Circuit's Ruling Would Have On The Ability Of Professional Associations To Effectively Publish And Disseminate Information.

Professional associations which publish standards and disseminate professional knowledge as an adjunct to serving their members and the public must not be restrained in their freedom to publish simply because some of their apparent agents have the ability to misuse the publication process. The panel announced that "[I]mposing liability on the principal will induce greater care to prevent misconduct by agents occupying especially sensitive or responsible positions that invite reliance" (A:14, 635 F. 2d at 125). This is an unsupported and potentially dangerous manner in which to curb misconduct by agents of an association.

First, it severely limits the ability of an organization to freely publish guidelines for the members it serves. If

the publishers of newspapers and other periodicals were held liable for every instance of concealed employee misconduct there would exist few entities willing to take the risks involved in exercising free speech. Second, the limitations imposed by the Second Circuit would result in the type of restraint on speech which this Court has long condemned. Though acts of fraud are not protected by the First Amendment, there must exist freedom to assure an unfettered interchange of ideas, *Roth* v. *United States,* 354 U.S. 476 (1957) and the widest possible dissemination of information *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964). This freedom would surely be restrained to an unreasonable degree if all organizations were put in the position of being unable to publish opinions or standards necessary to the people they serve simply because a novel and heretofore unaccepted standard of antitrust liability rendered such speech too risky to be carried on.

IV. If The Principle Announced In The Court Below Goes Unchallenged, The Courts Will Become Flooded With Unnecessary Litigation On Behalf Of And Directed Against Associations

The potential result inherent in the opinion below portends an enormous overload in litigation for professional associations which for years have relied upon well founded agency principles. This flood of litigation need not and should not become a reality. A review of the Second Circuit's opinion would avoid the necessity of further litigation in this area and would give needed interpretation to an area of law which is now, due to the present case, unsettled. It is unlikely that organizations affected by this novel ruling will be able to withstand the increased liability which will shortly follow without resorting to the courts in an effort to repair the damage left by the decision below.

V. The Court Should Grant Certiorari To Review The Impact The Panel's Decision Will Have On The Viability Of Voluntary Organizations.

It is clear that there are sound legal arguments for why a non-profit, voluntary professional organization should not be found liable for the unauthorized acts of its volunteers. There are also large philosophical and political implications of a court opinion which significantly expands the potential liability of voluntary associations, and thus makes it significantly more difficult for these associations to perform services for their members and the public.

A. Voluntary Associations Are Essential To The Maintenance Of Individual Freedom And The Functioning Of A Democracy.

Voluntary associations, and voluntarism in general, have been linchpins of American democracy. They are the outgrowth of the unprecedented freedom enjoyed by the American people, and are manifestations of the uniquely American awareness that freedom, individualism, and independence, if they are to be meaningful and enduring, must be tempered by restraint, collective action, and unselfish participation. From the very beginning of the American revolution, when the Minutemen confronted the British at Lexington and Concord and Paul Revere took it upon himself to warn his countrymen of the impending invasion, until now, when a multitude of voluntary professional organizations oversee the conduct and standards of their constituent professions, Americans have prided themselves on their ability to solve problems and serve needs without prodding from a centralized bureaucracy. They have cherished their freedoms and the opportunities for individual development which those freedoms have nourished, but

when necessary, they have not hesitated to band together and sacrifice their private interests to the public good.

Many observers have recognized the central importance of voluntarism to a democratic society. Alexis de Tocqueville devoted an entire chapter of his book *Democracy in America* to voluntary associations. He marveled at the number and variety of associations that had arisen in America, seeing a direct correlation between the myriad of associations in America and the spirit of equality that pervaded the nation. Unlike aristocratic societies where a few individuals have the power and wealth to accomplish great things, democracies consist of many individuals who by themselves are "independent and weak," and able to "do hardly anything for themselves."[3] In a country where political and economic power is decentralized, individuals have no choice but to "learn some habits of acting together in the affairs of daily life."[4] Indeed,

> "In democratic countries, knowledge of how to combine is the mother of all other forms of knowledge; on its progress depends that of all the others . . . If men are to remain civilized or to become civilized, the art of association must develop and improve among them at the same speed as equality of conditions spreads."[5]

In De Tocqueville's opinion, an association voluntarily entered into by individuals is far superior to the government in undertaking important enterprises. He recognized that government cannot "cope with every industrial undertaking beyond the competence of one in-

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[3] Alexis de Tocqueville, *Democracy in America*, edited by J. P. Mayer and Max Lerner, New York: Harper & Row, 1966, 488.

[4] De Tocqueville, 488.

[5] De Tocqueville, 488.

dividual," and that if it so attempted, the commercial, industrial and moral strength of the nation would decline.[6] Voluntary associations, thought de Tocqueville, are not only more efficient than the government, but also more supportive of a vigorous, free, well-informed, and generous citizenry.

Partly as a result of De Tocqueville's observations, the Supreme Court has extended the protection of the First Amendment to the right of association. *NAACP* v. *Alabama* 357 U.S. 449 (1958); *De Jonge* v. *Oregon* 299 U.S. 353 (1937). As with freedom of speech and the press, any law infringing upon an individual's right to associate is subject to strict judicial scrutiny. The fact that association has been given the full protection of the First Amendment is evidence of its supreme importance in American life.

B. The Panel's Decision Will Prevent Voluntary Associations From Serving Their Historic Functions.

The panel's decision extends the potential liability of voluntary associations to an unprecedented and dangerous degree. By the panel's reasoning, a voluntary association is liable under the Sherman Act for any illegal act of a volunteer member, even if the association disapproves of what the member is doing, is deceived by the member for his own ends, and is in no way benefited by the member's actions. To make matters worse, if found liable under the Sherman Act, an association must pay treble damages.

Adherence to the panel's reasoning will effectively put an end to many association functions. Organizations

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[6] De Tocqueville, 487.

may conclude that the benefits flowing to the public from their activities do not warrant assumption of the disproportionate risks and burdens imposed by the panel's decision.

There are four reasons in particular why associations cannot survive the increased liability inherent in the panel's decision. First, if the Circuit Court's decision is allowed to stand, private organizations will be unable to contend with the administrative burden of policing each of its volunteer members to ensure that none are engaged in illicit activities. To detect wrongdoing, the organization would have to monitor all of the activities, affairs, correspondence, and transactions of its members. No voluntary association, with its limited budget and human resources, can hope to accomplish such a task. Second, an organization that presumes to inspect the private business of its individual members will be less attractive to potential members. Part of the value of working through a voluntary association as opposed to the government, is the more informal, streamlined approach it allows individuals to take in problem solving. Members of voluntary associations presently enjoy the privacy to freely exercise their professional judgement within the guidelines established by their associations. But if these individuals are subject to constant monitoring from the organization and are required to adhere to a series of meddlesome regulations, the advantages of association will significantly diminish. Third, the panel's decision will encourage potentially frivolous suits against voluntary associations. Such actions are likely to be brought by parties who lack strong positions on the merits but who nevertheless assume the risk of litigation in hopes of winning treble damages. Even if most of these suits are unsuccessful, the costs of defending against them will be enormous. Finally, the decision will

discourage volunteer efforts by individuals fearful of exposing themselves to liability, and will induce many employers to forbid their employees to participate in an organization's activities.

C. The Panel's Decision Could Deprive The Public Of The Practical And Philosophical Advantages Of Voluntary Associations.

As voluntary associations abandon their former roles in response to the panel's decision, their functions will be either discontinued altogether or assumed by federal, state, and local governments. One does not have to agree with De Tocqueville that "knowledge of how to combine is the mother of all other forms of knowledge" to see that associations perform innumerable benefits for society, and that in their absence, many of the tasks businesses and individuals now take for granted will go undone. Certainly, the performance of many industries will decline as they are deprived of the data and technical information presently made available by associations. This is unfortunate, for productivity is already at a low ebb in this country. The lack of ethical guidelines provided by voluntary associations, meanwhile, will no doubt cause confusion among professionals and business executives.

AIME holds a unique position in the realm of professional associations. Its work and services to engineers would be placed in jeopardy if its volunteer members felt they could no longer serve AIME without subjecting themselves to serious risks. Should AIME become handicapped and forced to discontinue its work in the fields of mineral and energy development, the United States would suffer a great loss, not only in the decline in excellence of American engineering but also in economic

stability. For the United States to depend upon its energy and mineral producing capabilities, it must be able to depend on competent and readily available information of the type a professional association such as AIME provides.

The alternative—government assumption of association tasks—is not a promising solution. With respect to the promulgation of standards and codes, for example, no government can be expected to establish regulations of the quality and thoroughness maintained by the private organizations. Governments, after all, have little familiarity with subjects as specialized as safety in the mechanical engineering industry, and would probably devote neither the time nor the money necessary to ensure the development of reasonable and sound standards. Yet, even in the unlikelihood that the government could promulgate adequate standards, the taxpayer and consumer would suffer. An added layer of bureaucracy—engineers, lawyers, scientists—would be created to process, research, draft and distribute the regulations. This of course would increase taxes, paperwork, and the overall administrative burden on the average citizen. All in all, on a practical level the government would be vastly inferior to private organizations in setting, administering, and interpreting standards for the engineering profession.

Aside from practical considerations, the Court must consider the philosophical issues discussed by de Tocqueville. The judiciary must cast a wary eye on developments which in the long run threaten to result in government encroachment on the rights of the individual. If allowed to stand, the panel's opinion will do just that. In effect, it will discourage individuals associated with a particular profession from banding

together in an effort to serve a vital need of that profession. The resulting vaccuum, if filled at all, will be filled by government. Thus, the cycle that De Tocqueville so feared will be complete: an action by the government—in this case the judiciary—rendering private individuals helpless to act for themselves on an enterprise of importance, thus leaving the government to assume responsibility for the enterprise, which will result in increasing popular dependence on the government and further weakening the ability of individuals to fend for themselves.

Every such completed cycle makes the private individual slightly less free, independent, vigorous, imaginative and magnanimous, and the central authority slightly more cumbersome, inefficient, arrogant, ambitious, and overweaning. The net effect is a gain of government at the expense of private individuals. Such a result contradicts the current mood of the populace and the current thrust of legislation. Thus, the Court must be given an opportunity to exercise its historic and constitutional responsibilities in reaffirming the right and ability of individuals to assemble with one another on a voluntary basis to solve problems affecting the public welfare.

CONCLUSION

For the reasons stated herein the petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE D. WEBSTER
RICHARD H. MANSFIELD III
WEBSTER, CHAMBERLAIN, & BEAN
1747 Pennsylvania Ave., NW
Suite 1000
Washington, DC 20006
(202) 785-9500
Attorneys for Amicus Curiae

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CLERK

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Supreme Court of the United States

OCTOBER TERM, 1980

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,

Petitioner,

v.

HYDROLEVEL CORPORATION,

Respondent.

AMICUS CURIAE BRIEF OF THE AMERICAN METEOROLOGICAL SOCIETY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Counsel of Record:

NEIL J. RUTHER
GREENBERG & RUTHER
8 E. Mulberry Street
Baltimore, Maryland 21202
301-752-4929
Counsel for Amicus Curiae

Of Counsel:

ROBERT MCLAUGHLIN
GILMAN, MCLAUGHLIN & HANRAHAN
10 Post Office Square
Boston, Massachusetts

The Daily Record Co., Baltimore, MD 21202

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No. 80-1765

IN THE

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INTEREST OF AMICUS CURIAE

The American Meteorological Society (AMS) is a non-profit tax-exempt scientific and educational organization founded in 1919.[1] Its worldwide membership now totals 9758. The stated goals of the Society are the advancement of the atmospheric and hydrospheric sciences and professional ideals.[2]

[1] AMS is exempt from taxation as a non-profit scientific and educational corporation under the terms of Section 501(c) (3) of the Internal Revenue Code.

[2] Consent to the filing of this brief has been obtained from counsel for the American Society of Mechanical Engineers and

In furtherance of those purposes the AMS publishes six scientific and educational journals and through the efforts of its council maintains sixty-five boards, committees and commissions. These groups review new scientific advances, issue policy statements, set standards and conduct certification programs. Virtually all of this work is done by over three-hundred-seventy volunteer scientists and meteorologists at locations widely scattered from the Society's headquarters in Boston, Massachusetts.

One of these programs is the Board of Certified Consulting Meteorologists (CCM). Through its testing procedures the Board evaluates the competence and experience of professional meteorologists. Since no state or federal agency regulates in the field or licenses meteorologists, CCM designation has become an important standard in the industry.

All of these activities are of vital importance to the public. The profession has gone far beyond simple daily news program weather forecasts. Meteorologists are employed by government and industry to conduct environmental studies, provide specialized forecasts for agriculture, aviation and marine operations, assist in planning the location of new facilities, give warning of weather conditions and floods which threaten life or property among many other services.

The AMS interest in this case arises from its deep involvement in the self-regulation of the profession in the absence of any effort by government to do so. In performing this service the Society must rely on volunteer scientists and other professionals who in many instances are business competitors. The extent to which the AMS as a whole may be liable for any illegal and unauthorized

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Hydrolevel Corporation as is more fully evidenced by letters dated May 15, 1981 and May 19, 1981 signed by respective counsel and on file with the Clerk of this Court.

conduct of its members will have considerable impact on its ability to continue to engage in these activities.

ARGUMENT

THE SECOND CIRCUIT DECISION IN THIS CASE PLACES AN IMPOSSIBLE BURDEN ON PROFESSIONAL AND SCIENTIFIC ORGANIZATIONS WHICH THREATENS TO CURTAIL OR DESTROY EFFORTS AT SELF-REGULATION IN THE PUBLIC INTEREST.

The importance of the role of voluntary associations in the protection of the public is beyond question. Certainly, no government agency could hope to bring together all of the knowledge, talent and resources marshalled by these organizations. The necessity of using unpaid volunteers to fulfill this need was not questioned even by the Panel in this case. 635 F.2d at 126. The decision, however, fails to adequately consider the practical consequences which flow from this necessity. As is true of the AMS, volunteer services are performed at widely scattered locations far from the small administrative staffs maintained by the organization. The very essence of volunteer effort, particularly on the professional level, requires an independence of thought and action which defies supervision of the type used in commercial affairs. The opinion below held a scientific society liable for the acts of a volunteer even though such acts were unauthorized, were done without the knowledge of the Society, were not for its benefit and would have been impossible to prevent. The imposition of such a standard of strict liability in this setting is inappropriate and contrary to public policy.

This Court has recognized that the practices of professional organizations, while not exempt from antitrust enforcement, should be evaluated in a manner consistent with their public service role. *Goldfarb v. Virginia State Bar Association,* 421 U.S. 773, 788 n. 17. No case could present a more compelling opportunity for the application of this principle than the one now before this Court. The

Second Circuit decision will have a chilling effect on the ability of the AMS and other organizations to regulate their professions in the public interest. Moreover, it is difficult to see how the adoption of a more realistic standard of liability would endanger the policy of vigorous antitrust enforcement both public and private. The Plaintiff in this case sought and obtained redress from the individuals responsible for its injury and from their employers who were the only beneficiaries of their abuse of ASME's procedures. Such will always be the case where individuals make illegal and unauthorized use of their professional organizations to strike at business competitors. Thus, it is clear that a balancing of these two important policy considerations weighs heavily in favor of a different standard than that announced by the Second Circuit.

Even assuming that this Court were to agree with the doctrine established by the decision below, there are important reasons why this case should still be heard. In holding ASME liable for the conduct of its volunteer (Hardin) it suggested that the Society could have exculpated itself by exercising some further degree of supervision over his conduct:

> ". . . When an organization has placed a person in a position to do what Hardin did, *without any check or supervision,* it must bear the consequences. 635 F.2d at 126. (emphasis supplied)

Yet the uncontroverted facts show that Hardin's draft of the offending letter was sent to the chairman and vice-chairman of the full committee for their review. In failing to further define what, if any, level of supervision would be necessary the Panel left a great and important void in the center of so important a decision. Many scientific societies are now attempting to adjust their policies and procedures to meet the demands of rapidly changing interpretations of the antitrust laws. The AMS is

among such organizations. The lack of clarity in the Panel's decision on this issue will cause even those making good faith efforts to comply with the law to consider withdrawal from the field rather than risk the severe sanctions which will be imposed if an antitrust violation is found. Given the importance of these activities to the public interest, this Court should offer additional guidance.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

Counsel of Record:

NEIL J. RUTHER
GREENBERG & RUTHER
8 E. Mulberry Street
Baltimore, Maryland 21202
301-752-4929
Counsel for Amicus Curiae

Of Counsel:

ROBERT MCLAUGHLIN
GILMAN, MCLAUGHLIN & HANRAHAN
10 Post Office Square
Boston, Massachusetts

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN SOCIETY FOR TESTING AND MATERIALS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Lewis H. Van Dusen, Jr.
Morris R. Brooke
Robert J. Hoelscher
DRINKER BIDDLE & REATH
1100 PNB Building
Broad & Chestnut Streets
Philadelphia, PA 19107
(215) 988-2700

Attorneys for the American Society for Testing and Materials
Philadelphia, Pennsylvania

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CONSENT TO THE FILING OF THIS BRIEF

Counsel for petitioner and counsel for respondent have each consented to the filing of this brief amicus curiae by the American Society for Testing and Materials ("ASTM" or "the Society"). Copies of their letters are filed with this brief.

INTEREST OF THE AMICUS CURIAE

ASTM is a scientific and educational Society. It was incorporated in 1902 for the stated purpose of "the development of standards on characteristics and performance of materials, products, systems and services, and the promotion of related knowledge."

ASTM is the major developer and publisher of standards in the United States. Its activities are limited

to the development of standards (and methods of test to determine compliance with standards) and the promotion of related knowledge. It does not certify products; it does not test products; it does not involve itself in any way in the marketing of any product, material, system or service for which a standard has been developed under its auspices. Its standards are widely used solely because of the universal respect for the technical and scientific validity of its work.

The standards development work of the Society is carried on by approximately 84,000 participants who, voluntarily and without compensation, serve on the thousands of committees, sub-committees, task groups and other units

within the Society. These persons are representatives of industrial companies, government agencies, academic institutions, libraries, consulting firms, etc., as well as individual scientists, doctors, architects, engineers and others interested in the Society's work. Approximately 10% of them come from outside the United States.

The Society has provided the framework within which these volunteers do their important work. The Society provides only administrative assistance and procedural rules and regulations designed to insure that due process is afforded all participants in its work and a true consensus

of their views is achieved.*

The opinion and judgment of the United States Court of Appeals for the Second Circuit in this action may impose upon ASTM liability under the anti-trust laws for the acts of any of the many thousands of participants in its work, even though those acts are not authorized or endorsed by the Society and are, in fact, beyond the Society's power to prevent or control. The Society has an interest in seeking to prevent this unfortunate (and, we believe, unwarranted) new development in the law.

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*ASTM is exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code, and exempt from state and local taxation under Pennsylvania law. Application of ASTM, 231 F.Supp. 686 (E.D.Pa. 1964); ASTM v. Board of Revision of Taxes, 423 Pa. 530, 225 A.2d 557 (1967).

QUESTION PRESENTED

May a non-profit, membership organization be held liable under the anti-trust laws for acts of participants in its work which purport to be taken on behalf of the organization, but which are not authorized or endorsed by the organization and are beyond the organization's power to control?

SUMMARY OF ARGUMENT

It is unreasonable, and contrary to the public interest, to impose liability under the anti-trust laws upon a voluntary membership organization for acts of participants in its work which the organization has not authorized or endorsed and which it cannot control.

ARGUMENT

As we have pointed out above, there are some 84,000 participants in the work of ASTM's thousands of technical committees, sub-committees, task groups and other units. The standards and methods of test published by the Society are the product of the work of these persons.

Each of these units has a chairman and other officers. Virtually all participants are (and must be to do their work) equipped with ASTM stationery and other paraphernalia which could be misused without the Society's knowledge.

ASTM has a headquarters in Philadelphia and a staff of approximately 200 persons whose function it is to

provide the administrative services and support to enable the committees, sub-committees and other units of the Society to do their work. There is absolutely no way that headquarters personnel can control each and every written communication (much less every oral communication) emanating from the chairmen, officers or members of the Society's committees, sub-committees and other units. There is no way that the Society can prevent one or more of these individuals from issuing some interpretation of one of the Society's standards or methods of test which he purports to be issuing on the Society's behalf but which is, in fact, unauthorized.

If the Society may be held liable under the anti-trust laws for such a communication, the Society (a non-profit corporation with modest assets) is likely to continue to exist only until the entry of the first substantial anti-trust judgment against it under this new rule of law.

We believe that such a rule of law is unfair, unreasonable and not in the public interest.

ASTM (and other organizations like it) perform an important public function. Rather than attempting to describe the importance of ASTM's work ourselves, we quote below what courts have said on this subject:

"ASTM is the first source to which federal, state and municipal governments turn in seeking specifications, and ASTM specifications [standards] are

more widely used by them than the specifications of any other body. These governments rely extensively upon ASTM since they have neither the time nor the money to write all their own specifications, and their dependence upon ASTM is increasing all the time.

"The writing of specifications by ASTM is an activity in the public interest and conducive to the public welfare, and is important to the future operation of industry and government.

"Membership in ASTM, participation on its committees, the expression by members of their scientific opinions in committee meetings, and voting by members on proposed specifications, are activities in the public interest and conducive to the public welfare."

(Application of the American Society for Testing and Materials, U.S.D.C., E.D.Pa., 231 F.Supp. 686 (1964) Findings of Fact, Nos. 20,21,23)

"Among the objective achievements of the Society's works may be enumerated: Safer buildings, better roads, improved surgical implants, more advanced missiles; New scientific discoveries and developments resulting from advanced research; Better education for science and engineering students; Free library, free lectures and free knowledge for all people; Critical and necessary work for federal, state,

municipal and foreign governments; Savings to federal, municipal and other taxpayers.

"It must be apparent from even this meager summarization of the Society's spheres of activity that it is more than a 'business pool' as urged by the City. Dr. Allen V. Astin, Director of the National Bureau of Standards (an arm of the U.S. Government), speaking of the public benefits derivable from the Society's work said: 'The general public benefits through having an efficient economy. And our present technological way of life, which has raised for all of us our standard of living to unprecedent heights, is based to a significant extent on having available standard methods, reliable methods, of evaluating the characteristics and performance of material. Now, this is the main product, and from this all of us benefit. And, of course, the other participants in this economy, like the producers, and the big technological consumers, also benefit. But from all of these, the public is the major benefactor.'"

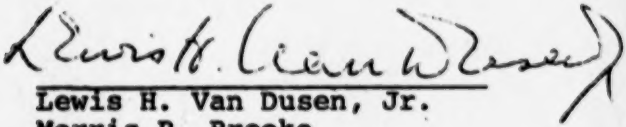
(American Society for Testing and Materials v. Board of Revisions of Taxes, 423 Pa. 530, 534 (1967).)

A rule of law which imposes liability upon ASTM for the acts of participants in its work, which the Society has not authorized and cannot control, would jeopardize the Society and its work for no reason. The person who does these unauthorized acts (and presumably the organization which this person represents) may be held liable under the anti-trust laws for their conduct. There is no public interest to be served by formulating a rule of law which makes an unwitting non-profit corporation (which would disavow the acts if it knew of them) also liable. Such a rule, if allowed to stand, can lead to the destruction of voluntary organizations like ASTM and the termination of their important public work.

CONCLUSION

For the foregoing reasons, the petition of the American Society of Mechanical Engineers for a writ of certiorari should be granted and the judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,



Lewis H. Van Dusen, Jr.
Morris R. Brooke
Robert J. Hoelscher
DRINKER BIDDLE & REATH
1100 PNB Building
Broad & Chestnut Streets
Philadelphia, PA 19107
(215) 988-2700

Attorneys for The American Society for Testing and Materials
Philadelphia, Pennsylvania

AFFIDAVIT OF FILING AND SERVICE

COMMONWEALTH OF PENNSYLVANIA:
COUNTY OF PHILADELPHIA : ss.

Lewis H. Van Dusen, Jr., being duly sworn according to law, deposes and says upon his personal knowledge:

1. I am a member of the Bar of the Supreme Court of the United States and an attorney for the American Society for Testing and Materials ("ASTM") in this case No. 80-1765.

2. On May 22, 1981, I caused to be sent by first class United States mail, postage prepaid, 40 copies of the foregoing Brief Amicus Curiae of ASTM, together with the ancillary papers required by the Rules of this Court, to the Clerk of this Court for filing.

3. On May 22, 1981, I caused to be served by first class United States mail, postage prepaid, 3 copies of said Brief upon Harold R. Tyler, Jr., Esquire, 30 Rockefeller Plaza, New York, NY 10112, counsel for petitioner in No. 80-1765, and upon Carl W. Schwarz, Esquire, One Farragut Square South, Washington, DC 20006, counsel for respondent in No. 80-1765.

Lewis H. Van Dusen, Jr.

Sworn to and subscribed before me this 22nd day of May, 1981.

Notary Public

ROSE A. MULLIGAN
NOTARY PUBLIC
PHILA. COUNTY, PHILA.
My Commission Expires Jan. 19, 1983

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BRIEF OF AMERICAN NATIONAL STANDARDS INSTITUTE, INCORPORATED AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN BOYER
Attorney for The American National Standards Institute, Incorporated
One Wall Street
New York, New York 10005
(212) 785-1000

Of Counsel:
JOSEPH POLIZZOTTO
CADWALADER, WICKERSHAM & TAFT
One Wall Street
New York, New York 10005

WILLIAM H. ROCKWELL
The American National Standards Institute, Incorporated

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The American National Standards Institute, Incorporated ("ANSI") respectfully submits this brief as *amicus curiae* in support of the petition filed by the American Society of Mechanical Engineers, Inc. ("ASME") for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Second Circuit entered on November 24, 1980. The filing of this brief has been consented to by both parties.

INTEREST OF AMICUS CURIAE

A. Identification of Amicus Curiae

ANSI is a federation of standards-developing and standards-using organizations founded in 1918 to coordinate the development of national standards.* Presently, over 900 companies and 200 trade, technical, scientific, professional, labor, governmental, and consumer organizations are members of ANSI, including ASME.**

Standards represent an important method of information transfer benefiting business, government, and the public at large. In most countries, government occupies the leading role in the formulation and promulgation of standards. In the United States, however, standards are developed and maintained largely through the efforts of the private sector. *See* Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health,* 56 Texas L. Rev. 1329, 1338 (1978).

In the past ten years, ANSI has approved and published 30,000 standards actions. Pursuant to ANSI procedures, standards are submitted for approval after development under a national consensus system, which affords to all affected parties the right to participate and accords effective private due process, including the right of appeal.

ANSI itself does not write standards. Rather, organizations and individuals submit standards to ANSI for approval. ANSI then conducts independent verification of the adequacy of consensus, again according an opportunity to participate to substantially affected interests. If a particular standard is found to enjoy consensus, it is adopted and published by ANSI, the sponsoring organization, or both, and is formally designated an

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* Charter members of ANSI included the five then-leading American engineering societies as well as the Departments of War, Navy, and Commerce.

** Like petitioner ASME, ANSI is a non-profit scientific organization exempted from federal taxation under Section 501(c)(3) of the Internal Revenue Code.

American National Standard. Approximately two-thirds of ANSI's income is derived from the sale of standards publications and one-third from dues of members.

The benefits accruing to society from the development and publication of voluntary standards are well established. While the voluntary standards process in the United States is non-industry specific and enormously complex, it is highly efficient and leads the world in technical standing.

The system works solely by reason of the considerable time, effort, and talent voluntarily devoted to the standards programs of ANSI's members. Without these contributions, the voluntary standardization needs of the Nation could not be satisfied. It is fair to conclude that, should voluntary standardization be unduly impaired by a doctrine of vicarious antitrust liability, the resulting costs to the economy, and to society as a whole, would be great.

B. Impact of Lower Court Decision Upon Amicus Curiae

ANSI has a vital interest in seeking review of the decision of the Court of Appeals, since the voluntary standards system that it has long sought to foster and coordinate is wholly reliant upon the spirit of voluntarism exhibited by its constituent members. In the face of a rule of vicarious liability premised on "unintentional" (negligent) "participation" in an antitrust conspiracy, the obvious response of the organizations through which these volunteers work will be to decline to devote their considerable efforts and skills to standards activities, thus undermining a system that has served the Nation well.

STATEMENT OF THE CASE

ANSI adopts the statement of the case set out in the petition of petitioner ASME.

REASONS FOR GRANTING THE WRIT

ANSI agrees fully with the reasoning contained in the petition filed by ASME. This brief will simply highlight certain erroneous legal and policy conclusions reached by the Court of Appeals.

(1) In fashioning a rule of vicarious liability based on "apparent authority," the Court of Appeals has lost sight of the crucial relationship between accepted principles of antitrust liability and the nature of the treble damages provision. The treble damages remedy provided in Section 4 of the Clayton Act performs a dual function — it is both remedial and punitive. *See generally Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86 (1977). Because the Clayton Act's punitive function is seriously justified only in terms of its deterrent effect, rules of antitrust liability should not work an unjust penalty upon unwitting objects of a conspiracy. As Professors Phillip Areeda and Donald Turner have observed:

> It must be recognized . . . that treble damages can be an embarrassment to antitrust policy . . . . [T]he common law's usual discomfort with imposing unforeseen liability is greatly exacerbated when compensatory damages are automatically trebled. A defendant might reasonably suppose that he is complying with the antitrust laws, only to discover that he was mistaken initially or that the law has changed in the meantime.

II P. Areeda & D. Turner, *Antitrust Law*, § 331b2, at 150 (1978). The Court of Appeals's holding imposing vicarious liability based on a theory of apparent authority accomplishes precisely that result — it imposes an awesome penalty in the absence of the organization having ratified, acquiesced in, or even having known of, the illegal activity.

(2) Moreover, in the day-to-day workings of the professional societies of the country, a rule of "apparent authority" will be hopelessly difficult to administer. Standards-developing organizations are obligated to accord private due process by other precepts of antitrust law in carrying out the development and approval of technical standards. *See, e.g., Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963). Accordingly, ANSI's constituents encourage the widest range of notice and comment on standards, including interpretations of their application to specific products, from both members and non-members alike. Comments relating to both proposed and

existing standards by committee members may appear on the letterhead of the committee, an employer, an autonomous local chapter of a constituent professional society, or personal stationery. The very reference to the specific American National Standard itself in correspondence could give rise to an inference that the writer somehow speaks for the organization that published the approved standard. The requirement of open participation in all phases of standards activity is in natural tension with a rule of liability that necessitates a determination whether a member is, in fact, apparently authorized to speak on behalf of the organization.

(3) Antitrust liability predicated upon a rule of apparent authority is unworkable for an additional reason. The very essence of the voluntary consensus process is to bring together divergent economic and technical viewpoints on specific issues of standardization, such as appropriate levels of safety or product performance. It is therefore inevitable that opinions will be expressed that tend to reflect adversely on the products, the technology, or the safety levels advocated by others that are the subject of comments on which opinions are sought. The significance or weight of an adverse comment, however, is in direct proportion to the reputation and objectivity of the commentator. Since the consensus system, with open membership and open participation by all affected parties, clearly includes those with adverse economic interests — buyers and sellers and competing sellers, among others — it is obvious to the immediate participants that the opinions expressed often reflect the economic interests of the commentator. In such an open system, however, it is unreasonable to hold ANSI's constituent members liable for failure to discover and control any improper or illegal motives or affiliations of individuals intent on compromising the system.

It is simply not adequate for the Court of Appeals to suggest that more comprehensive internal review procedures could eliminate the kinds of misconduct engaged in by the

disloyal members in the *Hydrolevel* case.* It does not take a resourceful mind to envision situations in which one person bent on advancing his own aims may use the organization as a vehicle for such ends. For precisely that reason, other Courts of Appeals have rejected the "apparent authority" approach to vicarious liability in more traditional spheres of antitrust law. *See, e.g., United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1006 n.4 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Truck Drivers' Local No. 421* v. *United States*, 128 F.2d 227, 235 (8th Cir. 1942). If commercial enterprises and unions are not expected to live up to such a standard, it defies reason to impose such a burden upon voluntary, non-profit organizations. This is so if for no other reason than that individuals are not as readily "controlled" in a voluntary setting as they may be in a corporate setting where they earn their living.**

* * * * *

If left to stand, the decision below could undermine the national voluntary standards system, dependent as it is upon the cooperation of innumerable organizations and individuals. The chilling effect of vicarious liability based upon the elusive concept of apparent authority is particularly grave to those smaller standards-developing associations unable to absorb a huge judgment. At the very least, it can fairly be said that the issue whether to impose the sanction of treble damages upon voluntary organizations without the organization's knowing participation, acquiescence in, or benefit from, a conspiracy, is worthy of this Court's review.

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* The improper conduct can in no way be viewed as symptomatic of a defective system. ANSI is not aware of any other case charging unintentional participation in an antitrust conspiracy by a voluntary professional society. ANSI itself has never been made a party to an antitrust action.

** Of course, it is not suggested that individuals who engage in conduct violative of the antitrust laws should be absolved of any liability. The concern here is in attributing such conduct to the organization where the organization has not ratified the illegal activity or benefited from it.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition filed by ASME, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN BOYER
One Wall Street
New York, New York 10005
(212) 785-1000

Attorney for The American National Standards Institute, Incorporated

Of Counsel:

JOSEPH POLIZZOTTO

CADWALADER, WICKERSHAM & TAFT
One Wall Street
New York, New York 10005

WILLIAM H. ROCKWELL
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JAMES R. HEELAN
American Nuclear Society
555 North Kensington Avenue
La Grange Park, Illinois 60525
Telephone: (312) 352-6611
Attorney for Amicus Curiae
American Nuclear Society

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,

Petitioner,

v.

HYDROLEVEL CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN NUCLEAR SOCIETY IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The American Nuclear Society (ANS) respectfully submits this brief in support of petitioner, the American Society of Mechanical Engineers (ASME), pursuant to Supreme Court

Rule No. 36. Consent to the filing of this brief has been granted by counsel for all parties. These letters have been submitted to the Clerk of this Court.

Petitioner is challenging the Second Circuit's decision in *Hydrolevel Corporation* v. *The American Society of Mechanical Engineers, Inc.*, 635 F. 2d 118 (2d Cir. 1980), which held that nonprofit, voluntary associations are liable under the federal antitrust laws for the improper and unauthorized acts of their volunteer members who have "apparent authority." This decision will have a severe adverse effect on professional associations that rely on the efforts of volunteer members to further their activities. The effect of this decision is to make ANS a guarantor of the good faith of its members. Thus, it is within ANS' interest to have this decision reviewed and reversed.

ANS is a nonprofit, scientific, and educational organization, with a membership of 13,000 engineers and scientists. ANS' main objective is to advance engineering and science relating to the atomic nucleus and allied sciences and arts. This is accomplished by encouraging research, disseminating information, holding meetings devoted to scientific and technical papers, setting voluntary standards, and cooperating with government agencies, educational institutions, and other organizations having similar purposes. Over 3,000 members volunteer their time and skills to ANS in order to accomplish these aims. ANS has 17 technical divisions and many committees through which members participate in ANS' activities and help to formulate ANS positions regarding the nuclear power industry. These division topics include such diverse subjects as nuclear criticality safety, fusion energy, and thermal-hydraulics. In addition, members contribute to a variety of ANS publications, including numerous nuclear standards and periodicals such as "Nuclear News," technical publications such as "Nuclear Science & Engineering," and monographs. A staff of 85 people assists the members in these volunteer activities.

The *Hydrolevel* v. *ASME* decision will greatly curtail ANS' activities. Under that decision, ANS will be placed in the

position of insuring the work product of its members. ANS cannot possibly perform the type of monitoring activities that such liability exposure entails. ANS does not have the daily contact, nor discipline and control, over its volunteers that a business has over its employees. ANS can vouch for a member's technical expertise and reputation for honesty and integrity; but it cannot vouch for his continuing honesty and integrity in each activity he is involved in, whether that be approving technical papers, setting standards, or any other facet of ANS' activities. Thus, if this decision stands, in order to insure that ANS will not be held liable for any dishonest acts of its volunteers of which it is unaware, ANS will have to severely curtail its many activities which depend on volunteers.

I

THIS DECISION HAS A CHILLING EFFECT ON THE AMERICAN NUCLEAR SOCIETY'S ACTIVITIES

ANS brings together skilled professionals as volunteers in order to use their professional and technical expertise in the nuclear field. Over 3,000 individuals participate in ANS activities which concern diverse and complex issues. It is therefore impossible for ANS to guarantee that an individual member, improperly motivated in a particular instance, could not misuse his position within ANS for either his own personal gain or that of his employer. However, under the *Hydrolevel* v. *ASME* "apparent authority" rationale, every activity in which member volunteers participate would have to be so guaranteed.

For example, ANS publishes a technical journal entitled "Nuclear Science & Engineering," which presents unreported technical papers concerning fundamental research in the nuclear sciences and engineering. It is conceivable that a volunteer reviewing papers submitted for publication could prejudice the economic interests of the author by refusing to publish simply for his own benefit or that of another. Under the *Hydrolevel* v. *ASME* decision, ANS would be potentially liable in a treble damage suit for any losses suffered by the author from such action.

It is also possible that an ANS committee member could use committee stationery and falsely purport to represent ANS in policy statements or public recommendations. If a member had reason to abuse his position, he could harm someone in a way that would not benefit ANS. Thus, ANS should not be held liable, especially since the individual member and the actual beneficiary of his misdeed would probably be held liable.

These are but two examples of how the *Hydrolevel* v. *ASME* decision affects ANS. With a paid staff of only 85, it is impossible for ANS to conduct its multi-faceted operation without utilizing volunteer assistance from its members. Thus, ANS must rely on its members' integrity to carry out its mission. However, under the *Hydrolevel* v. *ASME* holding, if one or more of its members has a hidden economic interest which he is able to exploit through his volunteer activities, ANS will be liable. The only alternative is for ANS to sharply limit its activities to those that can be accomplished by its paid staff, thus wasting the contribution that thousands of its members are capable of, and are making.

II

THIS DECISION DEPRIVES THE PUBLIC OF NUMEROUS BENEFITS CONTRIBUTED BY THE AMERICAN NUCLEAR SOCIETY

ANS makes numerous contributions to American society. One such contribution, for example, is the development and publication of standards for the nuclear industry. The types of standards developed are for designs, materials, parts, equipment, and their performance characteristics and reliability; methods of testing and rating; standards of practice, safety, and health; building codes; standard procedures for operating, processing, handling, storing, and transporting materials, parts, and equipment; and standards for selecting, training, and evaluating operators of equipment and processes.

To the consumer and to the public, the establishment of proper standards means quality control, product reliability, and consistent performance. In industry, standards are important as aids for purchasing and selling and for evaluating goods received and produced. In addition, standards serve to educate people designing, building, and operating nuclear power facilities.

ANS standards activities are carried on by its Standards Committee, which has numerous subcommittees under its direction involving more than 1,200 members.[1] Currently, 90 standards developed by ANS have been approved by the American National Standards Institute.[2] The Nuclear Regulatory Commission has referenced to approximately 15 ANS standards in its regulatory guidelines. A few of these are, for example: Administrative Controls and Quality Assurance for the Operational Phase of Nuclear Power Plants (ANS Standard 3.2 (1976)); Criteria for Accident Monitoring Functions in Light-Water-Cooled Reactors (ANS Standard 4.5 (1980)); and Medical Certification and Monitoring of Personnel Requiring Operator Licenses for Nuclear Power Plants (ANS Standard 3.4 (1976)).

The development of standards, like other ANS activities discussed, *supra* at 3-4, is also an area potentially subject to abuse by volunteers. Standards are supposed to be drawn to include all technically adequate equipment in the field. However, it is conceivable that one or more members of a standards committee could manipulate the development and/or interpretation of a standard to exclude some type of equipment, as occurred in *Hydrolevel* v. *ASME*.

---

[1] ANS is presently developing standards in many important areas, such as: Nuclear Criticality Safety; Research Reactors; Reactor Physics and Radiation Shielding; Nonradiological Environmental Effects; and Radioactive Waste Management.

[2] The American National Standards Institute is the nationally recognized coordinator of voluntary standards development and the clearinghouse for information on national/international standards.

Clearly, the development of standards dealing with highly technical issues involves a tremendous amount of work. This work is accomplished by highly skilled—and highly paid—professionals who *volunteer* their time and skills. If the government had to assume this task, it would cost the public millions of dollars. Not only would the cost be significant, but the development of these standards would surely add more red tape for industry to deal with at a time when the administration is trying to reduce the impact of regulations on industry.

The alternative to the government assuming ANS' activities is that the standards will not be developed at all, which would undoubtedly result in a reduction in quality control, product responsibility, and consistent performance. Such an occurrence could diminish the safety margin of an industry in which accidents may have serious consequences. To use anything but the most carefully conceived standards for nuclear power is grossly reckless. Thus, a likely result of the *Hydrolevel* v. *ASME* decision is to seriously reduce the amount of volunteer help and thereby delay the use of nuclear energy as a viable solution to our energy crisis. However, as long as ANS must be a guarantor of its volunteers' activities, the contributions that ANS makes to the development and acceptance of safe nuclear power are in jeopardy.

CONCLUSION

ANS has reviewed ASME's Petition for Writ of Certiorari. ANS respectfully joins ASME's contentions that a nonprofit, voluntary membership organization: (1) should not be held liable for "unintentional participation" in a conspiracy to restrain trade and to monopolize, in violation of Sections 1 and 2 of the Sherman Act, on a theory of negligence; and (2) should not be held strictly liable under the antitrust laws for all acts of its volunteer members within the scope of their "apparent authority," when (a) the acts were neither authorized nor ratified by the organization; (b) the members did not intend to, and did not in fact, benefit the organization by their actions; and (c) the members actively deceived the organization for their own purposes and benefit.

Respectfully submitted,

JAMES R. HEELAN
American Nuclear Society
555 North Kensington Avenue
La Grange Park, Illinois 60525
Telephone: (312) 352-6611
Attorney for Amicus Curiae
American Nuclear Society

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No. 80-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,

Petitioner,

v.

HYDROLEVEL CORPORATION,

Respondent.

BRIEF OF THE INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION OF THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT J. SIVERD
Attorney for
The Institute of Electrical and Electronics Engineers, Inc.
30 Rockefeller Plaza
New York, New York 10112
(212) 489-4100

Of Counsel:

DONOVAN LEISURE NEWTON & IRVINE
30 Rockefeller Plaza
New York, New York 10112

Questions Presented

1. Whether a national not-for-profit professional society should be held strictly accountable in treble damage liability under Sections 1 and 2 of the Sherman Act based upon conduct of volunteer members acting within their apparent authority, which conduct was not authorized or ratified by the society or carried out for its benefit.

2. Whether a national not-for-profit professional society's unintentional participation in a conspiracy to restrain and monopolize trade is a sufficient predicate for the imposition of treble damage liability on the society under Sections 1 and 2 of the Sherman Act.

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BRIEF OF THE INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS, INC. AS *AMICUS CURIAE*

Interest of the *Amicus Curiae*

The Institute of Electrical and Electronics Engineers, Inc. ("IEEE" or "Institute") submits this brief *amicus curiae*, with the consent of all parties, in support of the petition for a writ of certiorari filed by The American Society of Mechanical Engineers, Inc. ("ASME" or "Petitioner"), to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 24, 1980.

The decision of the Second Circuit raises serious and substantial policy, practical and operational implications for IEEE. IEEE is the world's largest engineering society with over 200,000 individual members engaged in a broad range of technical and professional activities, including the development and issuance of voluntary standards, which

are aimed at the advancement of the theory and practice of electrical and electronics engineering and the allied arts and sciences. The Court of Appeals held a sister society, the ASME, liable to respond in treble damages under the Sherman Act based on misconduct of two of ASME's 90,000 volunteer members while acting within their so-called apparent authority, without regard to whether such conduct was carried out for the ASME's benefit or ratified by it. The novel and unsound rule enunciated in the Court of Appeals' opinion effectively subjects professional societies to a species of strict liability in antitrust cases and threatens curtailment of the useful voluntary standards, technical, publication and educational programs such societies undertake for their good and the public interest.

Opinion Below

The opinion of the Second Circuit Court of Appeals is reported at 635 F.2d 118 (2d Cir. 1980), and is reprinted in the Appendix to ASME's petition for a writ of certiorari at A-1 to A-26.

Statutes Involved

The statutes involved in this case are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1970). These statutes are set forth in full in the Appendix at the end of this brief.

Summary of Argument

The Second Circuit, in a clear departure from precedent, has fashioned a new rule and policy that professional societies may be held liable to respond in treble damages under the Sherman Act for the acts of their volunteer members within their apparent authority even if the agents acted to benefit only themselves, not the society principal's interests. Established authority in this Court and elsewhere, in contradistinction, permits corporate Sherman Act liability for the acts of an agent only when the agent acts in the ordinary course of business to advance the principal's interests or when the principal ratifies the agent's conduct. The Court of Appeals' unreasoned and overreaching interpretation of the Sherman Act not only places professional societies at risk of strict antitrust liability based on a showing of mere unintentional participation in asserted unlawful conduct, but also strikes at the foundation of such societies' system of voluntary participation in useful technical, publication and educational programs. The new rule thus seriously threatens to curtail many of these beneficial activities.

For decades, the IEEE and other professional societies have, through dedicated volunteer efforts, issued and interpreted industrial and engineering standards, published and disseminated technical information, and fostered continuing technical and professional education in the public interest. They have done so through volunteer efforts structured in such a way as to recognize professional creativity, ingenuity and diversity, while, at the same time, providing a framework of procedural controls for institutional review to foster effective management and to aid in compliance with law, including the antitrust laws. This system of voluntary participation guided by flexible controls reflective of the diverse character of professional

societies and their members has resulted in valuable technical advancement, greater industrial competence and achievements and greater societal understanding of the use and value of engineering knowledge and technology.

The Second Circuit's unfounded rule of strict accountability under the Sherman Act is in conflict both with the philosophy of voluntary participation in professional society programs and with the realities of practical functioning of such societies. Its imposition may needlessly and seriously undercut the willingness of societies and their members to devote time to professional society activities and to continue to explore new areas of technical and professional endeavor, because the attendant antitrust risks of participation will be heightened greatly and because these risks cannot be sufficiently minimized by imposing more review and controls without stifling the system of voluntary participation. Indeed, a rule of strict liability may herald the curtailment of beneficial professional society programs in any case where organizational procedures theoretically may be abused by volunteer members for individual commercial advantage. In a large society such as IEEE, a significant number of such programs may be jeopardized, in spite of the existence of reasonable, workable procedural controls because of the impossibility of policing all society members' conduct. Accordingly, the Second Circuit's ill-conceived, overbroad rule of strict antitrust liability for professional societies, which demonstrably has neither legal nor practical foundations, should be reversed.

REASONS FOR GRANTING THE WRIT

The Second Circuit's Unreasoned and Overreaching Decision Imposing Strict Antitrust Liability on the ASME Should Be Reversed For It May Seriously Impair Beneficial Voluntary Technical, Publication and Educational Activities of Professional Societies Against Their and the Public Interest.

A. *The Court of Appeals Adopted an Erroneous Rule of Agency Liability for Professional Societies Under the Sherman Act.*

The overbroad rule adopted by the Second Circuit panel in *Hydrolevel Corp.* v. *American Soc. of Mech. Engineers, Inc.*, 635 F.2d 118 (2d Cir. 1980), is one of great significance for American professional societies in general and the IEEE in particular. The case as presented at trial involved the charge that representatives of the largest maker of a water boiler safety device known as a low-water fuel cut-off, McDonnel & Miller, Inc., and the leading underwriter of boiler insurance, Hartford Steam Boiler Inspection and Insurance Company ("Hartford"), and ASME, conspired in violation of Sections 1 and 2 of the Sherman Act to lessen competition by unlawfully restraining the sale of a competing type of fuel cut-off. The conspiracy theory advanced by plaintiff at trial rested on asserted misuse of the ASME committee structure charged with interpretation of that society's Boiler and Pressure Vessel Code ("Code"), which set performance standards for components of steam and water boilers and pressure vessels. 635 F.2d at 121. This misuse consisted of submitting a "loaded" question to the ASME, which elicited a misleading response

concerning the compatibility of Hydrolevel Corporation's fuel cut-off with applicable ASME Code requirements.*

With respect to the liability of ASME for conspiracy,** the District Court charged the jury that in order to find ASME responsible for the acts of its representatives, they had to find that ASME ratified the acts of its agents or that the agents acted to advance ASME's interests. 635 F.2d at 124-25. The lower court rejected plaintiff's proposed charge to the effect that "ASME would be responsible for its agents' actions if they acted within the scope of their apparent authority, even if they did not intend to benefit ASME." On the instruction given, the jury returned a verdict for Hydrolevel. 635 F.2d at 124.

On appeal, the parties' arguments focused on whether the evidence would support a verdict for Hydrolevel under either of the theories presented to the jury through the district judge's instructions. In its opinion, however, the Court of Appeals departed from established authority in

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* The "loaded" question was included in a letter of April 12, 1971, which inquired whether a fuel cut-off with a time delay device, such as Hydrolevel's, was compatible with Paragraph HG-605 of ASME's Code. The response of April 29, 1971, sent through an ASME staff secretary, but, in reality, composed by the Hartford representative, indicated that it was the intent of Paragraph HG-605(a) that "the low-water fuel cut-off operate immediately and positively when the boiler water level falls to the lowest visible part of the water gauge glass," and that with a time-delay feature functioning after the water level went below the glass gauge, there would be "no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period." 635 F.2d at 121-22. Armed with this response to the April 12 inquiry letter, McDonnel & Miller, Inc. proceeded to take advantage of it to dissuade customers not to purchase the Hydrolevel fuel cut-off, until Hydrolevel learned of the response of April 29, 1971, and was later advised that ASME, by letter of June 9, 1972, effectively disavowed any misleading character of the April 29, 1971 letter.

** The other two defendants, McDonnel & Miller, Inc. and Hartford, settled with plaintiff before trial. 635 F.2d at 124.

this Court and the lower courts which holds that a corporate principal may be liable under the Sherman Act for the acts of its agent only when the agent's conduct in the course of his actual authority in his employment duties was undertaken to advance the principal's interests. *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1006 n.4 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *Standard Oil Co.* v. *United States*, 307 F.2d 120, 129 (5th Cir. 1962); *Arthur* v. *Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824, 830 (D. Md. 1937). *See Coronado Coal Co.* v. *United Mine Workers*, 268 U.S. 295, 304 (1925). Instead, it relied on the thesis that a novel extension of this established rule of agency liability would "induce greater care to prevent misconduct by agents occupying especially sensitive or responsible positions that invite reliance. . . ." 635 F.2d at 125. The Circuit Court thus concluded that to uphold ASME's liability under the Sherman Act exposing it to punitive treble damages,

> "Hydrolevel had to demonstrate only that ASME's agents acted within their apparent authority when participating in the conspiracy; it did not have to demonstrate that they also acted in part to benefit ASME or that ASME later ratified their actions." 635 F.2d at 127.

Thus, without regard to the absence of any evidence that ASME's disloyal volunteers acted to benefit ASME in the conspiracy to restrain and monopolize trade under the Sherman Act and with only what it termed "ASME's unintentional participation" in the "harm Hydrolevel suffered" (635 F.2d at 131), the Court of Appeals sustained ASME's liability. In effect, the Second Circuit has embraced a special rule of strict liability for treble damages

for "unintentional participation" by professional societies in conduct which violates the Sherman Act. Professional societies are relegated to operate in an atmosphere subject to the constraint that if they should place a volunteer member in a position to misuse the society's organizational procedures or commit wrongs actionable under the antitrust laws, they must simply "bear the consequences." 635 F.2d at 126.

In adopting this approach, moreover, the Second Circuit's opinion, in fact, did not reach the two specific issues embodying theories of liability reflected in jury instructions in the lower court and actually argued by the parties. The first was whether there was any evidence that ASME intentionally or deliberately participated in a conspiracy to restrain and monopolize trade; the second was whether ASME's conduct in response to disclosure of the misleading use of the letter issued through the ASME amounted to ratification by it of the acts upon which the conspiracy was based.

B. *The IEEE Has Engaged in Useful Technical, Publication and Educational Programs for Its Members and for Public Benefit.*

The Second Circuit's new, unsound policy of strict accountability for professional societies under the Sherman Act promises to subject societies' beneficial technical, publication and educational activities to a host of needless and harmful consequences, and its deleterious impact will be experienced directly by IEEE. The Institute, which dates to 1884 with the establishment of the American Institute of Electrical Engineers, is currently the world's largest engineering society. Its objectives are both technical and professional in nature and are intended to promote the theory and practice of electrical and electronics engineering, the allied arts and sciences and engineering disciplines.

The IEEE is also committed to enhancing the quality of life for all people, through the application of technology in its field of competence and to promoting the understanding of the influence of that technology in the public welfare. As a transnational organization, IEEE serves more than 200,000 members organized geographically into 10 worldwide regions and various local sections and student branches. Also, primarily through libraries, the IEEE serves some 10,000 nonmember subscribers with its wide variety of publication services.

Among the many technical activities carried out by IEEE is the drafting and promulgation of voluntary standards,* an activity which figured centrally in the antitrust violation upheld by the Court of Appeals. IEEE has well over

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* IEEE standards are documents which set forth:

"(1) Lists of terms, definitions, or symbols, applicable to any field of science or technology within the scope of IEEE; (2) Expositions of scientific methods of measurement or tests of the parameters or performance of any device, apparatus, system or phenomenon associated with the art, science, or technology of any field within the scope of IEEE; (3) Characteristics, performance, and safety requirements associated with devices, equipments, and systems, with engineering installations; or (4) Recommendations reflecting current state-of-the-art in the application of engineering principles to any field of technology within the scope of IEEE." IEEE Standards Manual 1.2 (March 1978).

IEEE standards are "voluntary." The use of that term in this connection means that the choice of standards to be developed is voluntary, that the implementation of the standards developed is voluntary, that the organizations that develop standards are primarily organized to perform other functions and voluntarily develop standards because they have the unique expertise to do so, and that the individuals who work on the development of standards volunteer their time and effort as a public service. Further, even the application of these standards is voluntary, so that standards are used because their users have decided that they have merit and meet their requirements. This voluntary system has been responsible for effective utilization of technology at low cost to the public, and has in many ways been responsible for the technological leadership of the United States since the turn of this century.

a hundred technical committees involved in standards development, comprising 20,000 members covering some 850 standards projects and over 400 published standards. IEEE also provides formal representatives to other standardizing bodies. These standards are used by the industrial world for technical communications, for reproducibility of scientific measurement, for public safety, and for regulation. They provide a common ground for communication among those using the standards and help to make possible the safe wiring of public buildings, the safe transmission and distribution of electric power, the licensing of nuclear power stations by the Nuclear Regulatory Commission, the maintenance of safe industrial work places through federal agency regulations, the communication among people through telephone and radio systems, and the economic health and well-being of the peoples of the world through promotion of common international practices. Most important, these benefits are achieved essentially through the contributions of dedicated volunteer engineers and scientists working within the organizational structure of IEEE technical societies.

Furthermore, standards development and interpretation within IEEE are governed by procedures designed to achieve fairness by ensuring, for example, a balance of interests on standards committees, as well as the achievement of overall consensus by requiring, among other things, a high level of voting approval before issuance of a standard. The IEEE likewise works to secure adherence to the essentials of due process in handling complaints about standards through various appeals within the IEEE organization.* However, given the number of volunteer participants and the diversity of subject matter covered by

* The ASME follows substantially similar procedures in developing its own standards.

its standards, the Institute, within the framework of a flexible, voluntary system, realistically cannot oversee the activities of each standards or technical committee in detail.

Standards-making is only one of IEEE's technical activities, and other technical activities of the Institute share similar characteristics. The broad range of technical activities includes acoustics, ocean engineering, vehicular technology, nuclear science, information theory, management and social implications of technology. Each year, through its technical and regional entities, the IEEE sponsors or co-sponsors 150 major conferences and conventions. Most of these conference meetings publish proceedings and the conference books contain as many as 13,000 papers annually.

Control over technical activities, reflecting the diversified and voluntary nature of IEEE, is exercised, according to the Institute's Constitution and Bylaws, through governing groups of IEEE's thirty-one technical societies and allied technical councils. The societies and councils in turn have an infrastructure of hundreds of committees on which thousands of members serve. Most of these committees have their own stationery with the IEEE logo and identification and are capable of acting with a fair degree of autonomy and independence. Moreover, while the technical papers and conference publications at the core of IEEE technical activities are subject to review by peer-reviewers, many deal with controversial issues which may have considerable commercial significance, and not all can be reviewed in minute detail before presentation or publication.

Complementary to the IEEE's voluntary standards and technical activities are its publishing and educational programs. The IEEE perceives as one of its most impor-

tant services to the engineering and scientific communities the dissemination of evaluated technical information to advance knowledge and the state of the art. In its role as publisher, the IEEE publishes some 16,000 technical papers each year accounting for almost fifteen percent of the total world literature in electrical and electronics engineering, which because of their high quality, have achieved supranational recognition. The feasibility and quality of the publication enterprise depend on the volunteer efforts of some 15,000 members who act as reviewers and another 500 who serve as editors and conference organizers. In this area as in others, the Institute has imposed reasonable general organizational and operating controls by virtue of peer review and reviewer selection, but it is not in a position to second-guess the motives or the commercial intentions of all reviewers, some of whom might be regarded as potential professional or commercial competitors of a particular author.

In similar fashion, the Institute's educational programs work through volunteer support and further the important engineering and societal goals of maintaining a high level of engineering technology and education both in collegiate engineering programs and in post-graduate continuing education. In the field of continuing education, the Institute offers over 170 different short courses on a wide range of engineering topics through the efforts of 600 to 1000 volunteers. At the undergraduate level, the Institute acts to further engineering knowledge through participation in formulation of collegiate curricula. Also, in conjunction with the Accreditation Board for Engineering and Technology, the Institute participates in volunteer accreditation of engineering programs as representing a satisfactory level of engineering education for over 390 separate engineering programs at over 100 colleges and

universities. Here again, the Institute relies on general peer review to ensure reasonable control over the activities of volunteer members and to reduce the risk that specific members' personal or commercial interests might be used for individual advantage to the detriment of competing interests.

C. *The Second Circuit's Unwise Rule of Strict Antitrust Liability May Seriously Impede Continuation of the Beneficial Programs of IEEE and Other Professional Societies.*

Retention of the expansive rule of strict liability endorsed by the Court of Appeals threatens materially and adversely to affect the useful standards, technical, publication and educational activities of the Institute and other similar societies—by undermining the voluntary participation of society members and by exposing members and society organizations to much greater and unwarranted antitrust risks through the imposition of strict antitrust liability. Such a result runs counter to the recognition that professional societies perform valuable functions for their members and society as a whole. This Court acknowledged over a half-century ago that trade and professional societies have undertaken a wide range of programs "which are admittedly beneficial to the industry and to consumers. . . ." *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U.S. 563, 566 (1925). Without the consistent support and devotion of time of its volunteer members, IEEE's standards, technical, publication and educational programs could not continue in their present form. Nor would such beneficial programs be absorbed by government for its resources are likewise limited. Thus, the unwise policy of the Court of Appeals' new rule is not in the public interest, and it is likely to prove unworkable as a practical matter.

In the standards-making area, budgetary and organizational constraints simply will not permit the kind of perva-

sive supervision of IEEE's pre-existing consensus system, designed to balance interests and establish fair standards, that the Court of Appeals' rule seems to require in order to minimize the risk of antitrust liability. As a result, the Institute's contributions in this area might be seriously diminished. Moreover, the *in terrorem* effect of the Second Circuit's rule may well bear on the willingness of members or their employers to participate in IEEE standards programs.

Further, the impact of the new rule of strict accountability with its undermining of the voluntary participatory system that characterizes the IEEE and other professional societies will also spill over into the technical, publication and educational activities of the Institute with the same harmful consequences. In each of these areas, the Institute has hundreds, in some cases thousands, of volunteer members working to advance the interests both of the engineering profession and of society as a whole by expanding the knowledge and quality of engineering services and technology. IEEE has taken reasonable steps to reduce or eliminate risks that its procedures might be misused to allow a particular, selfish competitive interest to win out at others' expense, but notwithstanding these efforts, the Court of Appeals' rule superimposes the impractical and unfair requirement that IEEE and other societies are to be subject to the heightened risk of strict liability for less than intentional wrongdoing. This Court should not allow such an overbroad rule, lacking in both legal and practical foundations, to stand.

CONCLUSION

For the foregoing reasons, the petition of The American Society of Mechanical Engineers, Inc. for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

ROBERT J. SIVERD
30 Rockefeller Plaza
New York, New York 10112
(212) 489-4100

Attorney for
The Institute of Electrical and Electronics Engineers, Inc.

Of Counsel:

DONOVAN LEISURE NEWTON & IRVINE
30 Rockefeller Plaza
New York, New York 10112

Dated: May 21, 1981

APPENDIX

Statutes Involved

Sherman Act, Sections 1-2
15 U.S.C. §§ 1-2

§ 1. *Trusts, etc., in restraint of trade illegal; penalty*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. *Monopolizing trade a felony; penalty*

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

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NO. 80-1765

IN THE SUPREME COURT
OF THE UNITED STATES

October, 1980

THE AMERICAN SOCIETY
OF MECHANICAL ENGINEERS, INC.,
a New York corporation,

Petitioner,

vs.

HYDROLEVEL CORPORATION,
a New York corporation,

Respondent.

AMICUS CURIAE BRIEF OF THE NATIONAL COUNCIL OF ENGINEERING EXAMINERS IN SUPPORT OF THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC. FOR WRIT OF CERTIORARI

Oren O. Jones
Attorney for the National Council of
Engineering Examiners
JONES, NEWMAN, KUNES, HOLMAN & COX
415 North Main Street
Anderson, South Carolina 29622
(803) 224-3473

Of Counsel:

George F. Holman
JONES, NEWMAN, KUNES, HOLMAN & COX
415 North Main Street
Anderson, South Carolina 29622

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STATEMENT OF INTEREST OF AMICUS CURIAE

The National Council of Engineering Examiners has obtained the consent of Hydrolevel Corporation and The American Society of Mechanical Engineers, Inc. to file a Brief Amicus Curiae in Support of The American Society of Mechanical Engineers, Inc. Petition for a Writ of Certiorari. It is in the best interest of The National Council of Engineering Examiners, hereinafter referred to as The Council, that the lower court opinion be reviewed because of the fact that The Council's existence is gravely threatened by the opinion of the lower court.

The Council is a nonprofit organization organized in 1920 with its major purpose being to serve as an organization through which its member

state and jurisdictional boards can counsel and act together to better discharge their duties as individual autonomous regulatory agencies dedicated to the protection of the public life, health, and property. Full support is derived primarily from public funds consisting of examination fees. This Council consists of fifty state boards and four jurisdictional boards, (Puerto Rico, Guam, District of Columbia and the Virgin Islands) and thereby encompasses approximately 400,000 licensed professional engineers in various disciplines throughout the United States. The Council, an umbrella organization which is composed entirely of state and jurisdictional boards, interfaces with several other umbrella-type organizations of engineering societies,

such as ASEE, (American Society for Engineering Education) and ABET (Accreditation Board for Engineering and Technology), as well as with all of the major engineering societies which represent the various disciplines of engineering.

One of the primary purposes of this organization is the preparation of a semi-annual examination given as part of the process to qualify engineers as licensed professional engineers. Each year over 50,000 persons participate in this examination process through the above-mentioned state boards and jurisdictional boards. The staff which The Council has available to meet this primary purpose and the other purposes mentioned above consists of approximately 20 paid persons and another approxima-

ely 300 licensed professional engineers who receive for services performed during the two examination periods nominal compensation each year. The remaining contributions made to complete the purpose and goal of The Council are provided by individual licensed professional engineers throughout the country, who may or may not be individual members of the state and jurisdictional boards, who volunteer their time and talents to the organization freely and voluntarily and without compensation. It is estimated that each year several hundred thousand volunteer hours are expended by various licensed professional engineers on behalf of The Council. Almost totally through the efforts of these volunteers, there has been a uniformity in the examinations

given to qualify engineers as licensed professional engineers. Prior to the establishment of The Council, each state had its own separate examination committee to prepare the questions and answers and, as a result, the examination process was subject to immense local input and control. Through the creation of The Council, consistent, uniform, and objective standards for the licensing of professional engineers have been promulgated for the public benefit.

Along with its contributions to the standardization of licensing examinations, The Council has also worked to provide state and jurisdictional boards with uniformity in drafting a model law to better serve the public interests. Consequently, the public has been better served by

the creation of uniform standards of performance throughout the engineering community.

The contributions of The Council to the public and to the engineering community by providing testing standards and the model law and other related services for licensed professional engineers could not be effectively discharged without the invaluable and necessary contributions of volunteers.

REASONS FOR GRANTING THE WRIT

The opinion of the United States Court of Appeals for the Second Circuit in the case at hand, (Opinion No. 79-7254 and 79-7264) if allowed to stand, would irreparably damage The Council and its ability to serve the public as a whole. The Court of

Appeals for the Second Circuit affirmed a judgment against The American Society of Mechanical Engineers, Inc., hereinafter referred to as ASME, by finding that ASME had been an unintentional participant in an anticompetitive act directed against Hydrolevel Corporation by two "volunteer" members of ASME and their respective employers. Even though there was no showing that ASME had knowledge of the intent of the action of its volunteers, the Court nonetheless held ASME strictly liable for the misdeeds of the two volunteers because of their "apparent authority" to act in the area of code interpretation. Despite the fact that the intent of the actions of its volunteers were concealed from ASME, the Court nonetheless ruled that ASME must

assume the liability of the actions of the volunteer members based upon the Court's imposition of a standard of care which is unreasonable under the circumstances. The Court held that ASME was "strictly" liable for the actions of its volunteers despite its lack of knowledge, approval, or ratification.

From the perspective of The Council, the Court of Appeals has adopted an unprecedented and erroneous standard for vicarious liability under the anti-trust laws which, if allowed to stand, will place significant operational and financial burdens on The Council, and may in fact render The Council incapable of continuing to provide the service to the public that it presently renders.

If allowed to stand, the opinion

of the Second Circuit would have a chilling effect upon all volunteer efforts on behalf of The Council thereby depriving The Council of its tremendous source of workers and therefore, possibly forcing the Council out of existence. At present, volunteers of The Council provide contributions of their time and talent of their own free will and accord and with the consent, either expressed or implied, of the individual employers of the various volunteers. Further, many of the consultants provide their expertise and time for little remuneration and some of this country's best engineers provide their services for a nominal amount.

If allowed to stand, the opinion of the Second Circuit would effectively terminate all future voluntary

contributions now provided to members of The Council since volunteers and their employers would not subject themselves to the standard of liability imposed by the Second Circuit without substantial compensation. Further, and more important, if the decision is upheld, The Council would be put in the position of having to either be the insurer of the good faith of its members and volunteers or cease to exist due to its inability to be such an insurer. Cessation of existence is the more probable result.

If volunteers or their employees were no longer willing to assume responsibility, The Council would have to assume the exorbitant financial burden of hiring additional personnel to fulfill the services presently rendered by volunteers, provided such was

financially possible. The additional costs imposed upon The Council by being forced to pay for services performed would devastate The Council from an economic viewpoint and mean that The Council could no longer provide its objective uniform standard examinations to various state and jurisdictional boards without a substantial increase in the costs to those seeking licensure. As a result, the state and jurisdictional boards would have to develop their own examinations and thereby subject licensing examinations to local controls and local inconsistencies. In addition, given the additional financial burden of having to hire additional personnel to replace the voluntary efforts, it is entirely possible that this burden would be excessive and that The

Council would be forced to cease all operations due to the unfeasibility of paying full time personnel to replace the voluntary contributions now made by the individual licensed professional engineers.

If The Council could no longer effectively operate, this would be tremendously detrimental to public interest as a whole. The Council could no longer provide examinations for the licensing of professional engineers and the model law, as well as other services provided by The Council. As a result, the public could not be assured that standards of competence would be consistent throughout the engineering community. It is unreasonable to assume that the Federal Government or that state and local governments could absorb the functions

and services provided by The Council if, as a result of the Second Circuit's opinion, The Council could no longer effectively function.

The Council does not propose that its non-profit status or its voluntary organizational basis limits or restricts its immunity from anti-trust liability; however, The Council strongly asserts the position of ASME in stating that no professional society can exist if held strictly accountable for the unauthorized acts of individual voluntary members when, as a result of such actions, another party is injured. The standard imposed by the Second Circuit in the case at hand would serve, in effect, to severely limit the operations of The Council and its ability to deliver service to the public.

CONCLUSION

For the reasons outlined herein, The National Council of Engineering Examiners prays that the petition of The American Society of Mechanical Engineers, Inc. for a Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

Oren O. Jones
Attorney for The National Council of Engineering Examiners
JONES, NEWMAN, KUNES, HOLMAN & COX
415 North Main Street
Anderson, South Carolina 29622
(803) 224-3473

Of Counsel:

George F. Holman
JONES, NEWMAN, KUNES, HOLMAN & COX
415 North Main Street
Anderson, South Carolina 29622

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OCTOBER TERM, 1980

AMERICAN SOCIETY OF
MECHANICAL ENGINEERS, INC.,
Petitioner

v.

HYDROLEVEL CORPORATION,
Respondent.

Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

BRIEF OF THE NATIONAL FIRE PROTECTION ASSOCIATION AS AMICUS CURIAE

DANIEL J. PILIERO II
General Counsel
National Fire Protection
Association
WEBSTER, CHAMBERLAIN &
BEAN
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 785-9500

Of Counsel:

MYRREL C. HENDRICKS, JR.
PAUL H. NETTESHEIM
WEBSTER, CHAMBERLAIN & BEAN
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202)785-9500

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To The United States Court of Appeals
For The Second Circuit

BRIEF OF THE NATIONAL FIRE PROTECTION ASSOCIATION AS AMICUS CURIAE

INTEREST OF THE NATIONAL FIRE PROTECTION ASSOCIATION AS AMICUS

The National Fire Protection Association (hereinafter "NFPA") is a not-for-profit educational, voluntary membership organization dedicated to the protection of lives and property from fire. By consent of the parties NFPA respectfully submits this brief as Amicus Curiae, urging that the Petition for a Writ of Certiorari as filed by the American Society of Mechanical Engineers (hereinafter "ASME") be granted to

review and reverse the unprecedented and erroneous vicarious liability standard adopted by the Second Circuit.

Founded in 1896, NFPA draws its approximately 32,000 members from all segments of society,[1] including professional fire fighters, educators, businessmen, architects, engineers, and other members of the public interested in fire safety. The principal goal of NFPA is to protect man and his environment from fire by serving as a catalyst to identify and address fire safety issues.

NFPA develops and continually updates[2] approximately 240 codes[3] and standards encompassing virtually every aspect of fire safety and fire protection. Because they represent the collective efforts of experts in many fields and are technically accurate, many of the standards and codes developed by NFPA are adopted directly into law or serve as a model for laws on the federal, state, or local level. In addition, many businesses and industries voluntarily follow NFPA fire safety standards for their own protection.

The effect of these codes and standards can be seen everywhere. Smoke detectors in homes, protective clothing for fire-fighters and fire safety features incorporated in public buildings, such as fire extinguishers, sprinklers, illuminated exit signs, and stairway fire doors are some of the more visible results. Less visible areas addressed by NFPA codes and standards include hazardous materials transportation, flammable liquid storage, electric wiring and fire fighter qualifications.

NFPA's standards development has always been dependent upon the work of volunteers. Approximately 2,400 experts from business, industry, government, educational institutions and the general public volunteer their time to serve on the 167 NFPA Technical Committees, working to keep the 240 NFPA

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[1] See graph Appendix I.

[2] Such updating is a continuous process which guarantees that the fire safety standards incorporate the most recent technological developments.

[3] The best known of the NFPA codes are the Life Safety Code and the National Electrical Code.

sponsored codes and standards current and meaningful. Representation on the technical committees of many divergent interests and points of view serves to ensure that no one interest group can dominate or unduly influence a committee. The standards development process is completely open—such that any interested person may propose, or comment upon the adoption, modification, or withdrawal of any NFPA standard.

The expertise and technical know-how that these 2,400 volunteers collectively are able to focus on fire safety and fire protection problems is a valuable resource, NFPA's standards process could not function effectively without the countless thousands of hours donated by these volunteers.

The theory of liability espoused by the opinion below imposes treble damage liability upon a voluntary standards developing organization based solely on the acts of disloyal volunteers, whose purposes are wholly contrary to those of the organization. In practical terms such organization becomes an insurer against the unauthorized disloyal acts of a volunteer member even though it had no knowledge of the unlawful acts.[4] As such, it threatens the structural underpinnings of the voluntary standards development process—reliance upon committee members and their technical expertise.

If the opinion below is permitted to stand, it will imperil the ability of NFPA and virtually every other major standards developing organization to function effectively.[5] Thus, the Court's decision in this case will have a broad direct impact upon the entire standards developing community—including NFPA.

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[4] Such liability against the non-profit organization is wholly unnecessary where, as here the corporate employers of the disloyal volunteers, James and Hardin, were liable for the damages, if any, sustained by Hydrolevel Corporation.

[5] At a minimum this new vicarious liability standard will greatly increase the costs and the length of time necessary to maintain and interpret safety and performance standards. Many volunteers will choose not to serve rather than be burdened by the additional layers of procedural restraints that the decision below seems to contemplate. As a result many organizations may be forced to forego this additional expense and risk by curtailing their standard activities.

INTRODUCTION AND SUMMARY OF ARGUMENT

This action was originally commenced against three defendants, including ASME, alleging a conspiracy to restrain trade or to monopolize in violation of Sections I and II of the Sherman Act. ASME is a non-profit tax-exempt scientific membership society which develops voluntary performance and safety standards. Prior to trial, plaintiff settled with corporate defendants McDonnell-Miller Corporation (hereinafter "M&M") and Hartford Steam Boiler Inspection and Insurance Company (hereinafter "Hartford") for $725,000 and $75,000 respectively.[6]

ASME was sued based on the issuance and subsequent misuse of a single letter interpreting a section of ASME's Boiler and Pressure Vessel Code. This letter dated April 29, 1971 was drafted by T.R. Hardin as chairman of the relevant subcommittee in response to a letter of inquiry. Unknown to ASME, Hardin and John James, another volunteer committee member had drafted the original inquiry. Neither the inquiry letter, nor the interpretations letter mentioned Hydrolevel or its product. Their intention was to use the ensuing response, as drafted by Hardin, to the advantage of M&M and Hartford by whom they were employed. Subsequently M&M and its sales personnel misrepresented the letter to potential purchasers claiming that Hydrolevel's competing product did not meet the relevant safety standard.

The case went to trial with ASME as the lone defendant. At the conclusion of the evidence the trial judge held that the evidence was insufficient to find ASME liable as an active participant in the alleged conspiracy. The case went to the jury solely on the alternate theory that ASME may have acquiesced in or ratified the illegal acts in furtherance of the conspiracy. The jury returned a verdict against ASME in the amount of $3.3 million dollars prior to trebling.

On appeal ASME's principal contention was that the facts adduced at trial failed to show that it had knowingly and

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[6] The settlement on behalf on M&M was actually paid by International Telephone and Telegraph Company which had acquired M&M.

intentionally participated in the conspiracy or ratified the unauthorized actions of two volunteers. ASME also contended that volunteers James and Hardin did not intend to benefit ASME and therefore could not properly be "agents" of ASME in carrying out this scheme.[7]

The panel chose to sidestep the arguments raised by ASME[8], instead adopting a wholly new and unprecedented standard of liability premised on "apparent authority". Thus the liability of ASME was sustained on a theory that was never considered by the jury. 635 F.2d 124. The concept of "apparent authority" of an agent was transplanted and applied as the standard for measuring whether ASME had "unintentionally participated" in the antitrust conspiracy alleged by Hydrolevel.

Under the terms of the Sherman Act a conspiracy to restrain trade or to monoplize requires a deliberate and intentional commitment to a common plan, scheme, or end. This Court has held on numerous occasions that participation in a Section I or II conspiracy requires a showing of deliberate and intentional participation in the conspiracy.[9] Absent such a showing judgment must be entered for the defendant as a matter of law.

Prior to the decision below no federal decision had ever held a defendant liable for "unintentional participation" in a Section I or II conspiracy. Indeed the "apparent authority" doctrine had been expressly rejected as inconsistent with the policies and purposes of Sections I and II of the Sherman Act.[10]

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[7] Logically they could not have intended to benefit ASME through their actions, rather they sought to benefit M&M and Hartford.

[8] One can surmise that the panel choose this course because the record was, as ASME had argued, insufficient to support a finding of liability without stretching to discover this new liability standard.

[9] See *e.g.*, American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946) and United States v. United States Gypsum Co., 438 U.S. 422, 443 n. 20 (1978).

[10] *See* Coronado Coal v. United Mine Workers of America, 268 U.S. 295 (1925); Truck Driver's Local No. 421 v. United States, 128 F.2d 227 (8th Cir. 1942); and United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972).

Noticeably absent from the decision below is citation of even a single antitrust case on this issue.[11]

The decision below is a fundamental deviation from the principles governing participation in a conspiracy to restrain trade or monopolize. One can not be held liable for participation in Section I or II conspiracy without an intent to act jointly and at a minimum some knowledge of the illicit purposes of the conspiracy.[12] The panel has departed from this long established rule of law. In the process it creates an unwise and unsound new standard of antitrust liability. The Court should exercise its discretionary jurisdiction to hear this case and should reverse the Court of Appeals decision.

ARGUMENT

I. THE PANEL'S DECISION EXTENDING VICARIOUS ANTITRUST LIABILITY BASED ON "APPARENT AUTHORITY" IS WHOLLY UNPRECEDENTED AND UNWARRANTED.

Sections I and II of the Sherman Act are designed to protect the natural balance of competitive forces in the marketplace. Protection and preservation of competition, not specific competitors, is the underlying goal. Hydrolevel's principal claim in this action was that issuance of the letter of April 29, 1971 and the subsequent misrepresentations thereof by M&M and its salesmen constituted a conspiracy in restraint of trade or to monopolize the low-water boiler cut-off market.

Under either §I or §II this Court has repeatedly required that a plaintiff demonstrate an intentional purposeful agreement among the alleged co-conspirators. *United States v. United States Gypsum*, 438 U.S. 422, 443 (1978) and *United States v. General Motors Corp.*, 384 U.S. 127, 143 (1966). The

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[11] Perhaps even more troubling is the adoption of the "apparent authority" standard despite the lack of any reliance by the plaintiff. Such reliance is the genesis of the "apparent authority" doctrine. Yet it has never been suggested that Hydrolevel relied upon the authority of James and Hardin to act on behalf of ASME.

[12] American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. General Motors Corp., 384 U.S. 127, 143 (1966); and United States v. United States Gypsum Co., 438 U.S. 422 (1978).

decision below stands in stark contrast to these precedents explicitly premising its conclusion concerning liability upon "unintentional participation."[13]

The panel concluded that ASME was responsible in damages based on the involvement of James and Hardin in the conspiracy alleged by Hydrolevel. Under the panel's analysis it did not matter that:

> (1) the organization was without knowledge of the real motives and purposes of James and Hardin;
>
> (2) the conspiracy was not intended to benefit the organization; and
>
> (3) the organization was actively deceived by James and Hardin to benefit their actual principals.[14]

The panel's resolution of the liability issue charts an entirely new course for determining vicarious antitrust liability. The element of knowing intentional participation in the conspiracy to restrain trade or to monopolize is discarded. The panel substitutes a far different "apparent authority" standard which supplants the requirement of knowing and intentional participation.[15]

This novel and wholly inappropriate standard permits ASME to be held liable without regard for its lack of knowledge of or participation in the conspiracy alleged. The acts of two disloyal volunteers, who purposely deceived the organization to further the business interests of M&M and Hartford, are imputed to ASME. Application of this common law intentional tort standard is both erroneous and unprecedented.[16]

In reaching its conclusion the panel ignored the long standing principle of agency law that authority for an agent to

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[13] 635 F.2d at 131.

[14] In this context, their employers M&M and Hartford.

[15] In adopting this standard the panel analogizes the conduct of James, Hardin and their co-conspirators to certain intentional torts and concludes that the "apparent authority" standard controls on the facts of this case. 635 F. 2d 125.

[16] See *e.g.*, Radiant Burners, Inc. v. Peoples Gas Light and Coke Co., 364 U.S. 656 (1961).

commit criminal or tortious acts is not to be readily inferred.[17] This principle was applied in *U.S. v. Ward Baking*, where the court held for the defendant in a civil action brought by the government. The court held that there was insufficient proof that "an agent of the defendant who had authority to bind it participated in any way in the conspiracy . . . or ratified such participation."[18] 243 F. Supp. 713, at 717 (E.D. Pa. 1965). The decision below is directly contrary to this principle as relied upon in *Ward Baking*.

Similar to the case at bar plaintiff in *Structural Laminates, Inc. v. Douglas Fir Plywood Association*, 261 F. Supp. 154 (D. Ore. 1966) sought treble damages alleged to arise from the exclusion by means of a voluntary product standard of an innovative new product with a revolutionary design. Plaintiff plywood producer alleged that its new design for 3-ply half inch plywood was unlawfully excluded from the market by means of defendant's product standard.[19] Plaintiff urged that treble damages should be assessed regardless of whether the defendant voluntary association was found to have any unlawful intent or purpose. The trial court concluded:[20]

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[17] The Restatement Second of Agency §34, comment (g) articulates this principle as follows:

> g. Illegal acts. Authority to do illegal or tortious acts, whether or not criminal, is not readily inferred. Thus, the appointment of a person to act as manager does not thereby give him authority to make trade agreements as opposed to public policy that they will not be enforced, or to inaugurate illegal blacklists or boycotts, or to make fraudulent statements concerning his principal's goods.

[18] Thus ASME should not be liable unless it ratified, with full knowledge of the material facts, the acts of Hardin and James or unless Hardin and James intended to benefit ASME by their activities. Restatement Second of Agency §§173, 235 and 236. Unless either of these tests can be satisfied ASME can not properly be held liable.

[19] Plaintiff there alleged that his product was wrongfully refused certification under the existing standard which called for use of more than 3-plys (layers) in half inch plywood.

[20] Similar results have been reached regarding antitrust liability for standards developing activities in Radiant Burners Inc. v. Peoples Gas Light and Coke Co., 364 U.S. 656 (1961); Eliason Corp. v. National Sanitation Foundation, 614 F. 2d 126 (6th Cir. 1980); *cert. denied*, 49 USLW 3246 (October 7, 1980); and Roofire Alarm Co. v. Royal Indemnity Co., 202 F. Supp. 166 (E.D. Tenn. 1962), *aff'd* 313 F. 2d 635 (6th Cir. 1963), *cert. denied*, 373 US 949 (1963).

> Absent a bad purpose what was defendent's anti-trust liability? It was responsible for the commercial standards which did affect adversely the marketing of plaintiff's product. Plaintiff's 3-ply ½" was suitable for inclusion in the commerical standards, but 3-ply ½" plywood did bear a poor reputation in the industry in 1958. Had defendant been vigilant, it might have concluded in 1958, or sooner, what it did conclude in 1962—that the bad reputation was unjustified.
>
> If intent and purpose are factors in the anti-trust law, and the court believes they are except where *per se* violations are involved, then the mere failure of one who is responsible for the adoption of a commercial standard to appreciate changes which make that standard obsolete and to take immediate and effective action to alter it, does not amount to a conspiracy to restrain trade . . . This much however is congressionally sanctioned and the court is of the opinion that in the absence of a bad purpose, mistakes made in the formulation or maintenance of standards do not subject the one making the mistake to anti-trust liability. (Footnotes omitted). 261 F. Supp. at 159.

This conclusion is also implicit in this court's decision in *Coronado Coal v. United Mine Workers of America*, 268 U.S. 295 (1925). *Coronado Coal* squarely rejects the theory of apparent authority for purposes of imputing vicarious antitrust liability.[21] The concept of reliance upon which such theory is predicated has no relevance to these facts or to the policies of protecting and preserving competition embodied in the Sherman Act.[22] *See Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc.* 429 U.S. 477, at 488 (1977), *citing with approval, Brown Shoe Co. v. United States*, 370 U.S. 294, at 320 (1962).

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[21] For further discussion see ASME's Petition at 12-14. *See also*, Truck Drivers' Local No. 421 v. United States, *supra*, at 235.

[22] The element of reliance has no application to the policies embodied in the federal antitrust statutes, since such statutes protect competition and the natural functioning of the marketplace, not individual competitors. Brown Shoe Co. v. United States 370 U.S. 294, at 320 (1962).

II. THE PANEL'S DECISION WILL HAVE DEVASTATING CONSEQUENCES ON VOLUNTARY STANDARDS SETTING ORGANIZATIONS AND THE AVAILABILITY OF CURRENT, TECHNICALLY ACCURATE PRODUCT PERFORMANCE AND SAFETY STANDARDS.

Since the turn of the century voluntary product standards[23] have been an integral part of the domestic economy.[24] The National Bureau of Standards has identified over 400 educational, scientific, technical or other non-profit organizations that are involved in developing product standards. These organizations range from organizations, such as NFPA, who develops and maintains standards for a broad spectrum of fire safety and protection needs, to organizations which develop and maintain standards for a single products or category of products.[25]

Voluntary standards organizations serve the public interest channeling billions of dollars worth of volunteer manpower and expertise to the public good. Through the efforts of these organizations the quality of life is enhanced by greater availability of information on product safety and product performance. These organizations must rely upon thousands of individual volunteers to donate their time and expertise to serve on standards committees.

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[23] Essentially a product standard is a technical document which describes design, material, safety or performance characteristics of a particular class of products. Ordinarily, a product standard represents the distillation of currently available knowledge concerning the characteristics of the product.

[24] A strong federal policy of encouraging and fostering private organizations to develop and maintain product safety and performance standards is embodied in Office of Management and Budget Circular No. A-119, 45 Fed. Reg. 4326 (January 21, 1980). The circular specifically encourages the participation by government employees as volunteers on standards writing technical committees. The circular also encourages executive branch agencies to rely upon these voluntary product standards for procurement and regulatory purposes, whenever appropriate. The circular states: "Federal participation in the standards-related activities of these voluntary bodies provides incentives and opportunities to establish standards to serve national needs." OMB Circular, at 4326.

[25] For example, the Association of Home Appliance Manufacturers and the Tile Council of America.

The liability standard adopted below confers the status of insurer for all acts of their volunteer committee members upon these non-profit organizations. The loosely defined concept of "apparent authority" creates innumerable potential plaintiff's actions. Such liability will attach even where, as on the present facts, the volunteers act solely to benefit a third party[26] and deceive the standards organization to benefit themselves and such third party.

The panel's proferred solution of additional review procedures is unworkable. It is extremely unlikely that additional review procedures, no matter how well conceived, will effectively combat the rare situation where volunteers on a committee actively conspire to deceive the standards organization to benefit their employer.[27] The inherent delays and additional commitment of time will discourage many volunteers from continued service on such committees.

Without exception the major standards developing organizations, such as ASME and NFPA, rely upon committees comprised of volunteers to develop, maintain, and interpret product performance and safety standards. The efforts of these volunteers and knowledge and expertise they possess is vital to the effective functioning of the voluntary standards process.

Inasmuch as product standards are technical documents, requests for interpretation or informal guidance are routinely received and processed. This interface between the standards organizations and those who utilize and rely upon their standards is ordinarily handled by the volunteers on the relevant technical committee.[28] Responses to these requests provide valuable and often essential information to prospective product users.

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[26] In this case their corporate employers M&M and Hartford.

[27] Based upon their knowledge of ASME's own procedures for processing such requests, James and Hardin were able to circumvent and subvert this process to their own purposes.

[28] The decision below betrays a fundamental misconception of the nature of the April 29, 1971 letter. The process of responding to requests for interpretation, clarification, or guidance concerning the technical requirements or language of a performance or safety standard must be distinguished from the procedures for certifying that a specific product complies with the relevant

(footnote continued)

Contrary to the panel's suggestion ASME was neither negligent nor otherwise culpable based on the issuance of the April 29, 1971 letter.[29] Absent some credible reason to suspect that the original request was contrived and without knowledge of the complicity of ASME volunteers on the relevant subcommittee, no set of procedural safeguards would have aborted the conspirators' scheme to deceive ASME.

If left undisturbed the decision below will have a severe adverse impact on the ability of all standards developing organizations to recruit highly qualified volunteers to staff their technical committees. The additional commitment of time and resources to install additional procedures and litigate potential claims under the newly espoused "apparent authority" or "unintentional participation" theory will have no offsetting practical benefits.

(footnote continues)

standards. This formal certification process is routinely handled by an independent body such as a testing laboratory, rather than by the standards body or an affiliated organization. The letter of April 29, 1971 resulted from a request for guidance concerning ¶ HG-605 of the Boiler and Pressure Vessel Code, *not* from a request as to whether Hydrolevel's product either was or could be certified as complying with the low-water fuel cut-off standard. The decision below does not take account of this crucial distinction. The panel states:

> Absent some internal review procedures, no individual should be empowered to rule dispositively on the fitness of a competitor's product. When an organization has placed a person in a position to do what Hardin did, without any check or supervision, it must bear the consequences. 635 F. 2d 126 (1980).

[29] While the second paragraph of the letter is a nonsequitur, it is essentially a technically correct statement based upon the positioning of low-water fuel cut-off probe which is assumed in the inquiry letter. The damages, if any, suffered by Hydrolevel flow from the misrepresentations made by M&M and its salesman concerning the content and meaning of the letter. The panel erroneously assumes that closer supervision of the thousands of ASME volunteers could have precluded the issuance of the April 29, 1971 letter and the subsequent misrepresentations by M&M and its employees and salesmen. 635 F.2d 126 (1980).

CONCLUSION

The Court should exercise its discretion to grant certiorari in this case and should reverse the judgment of the Court of Appeals.

Respectfully submitted,

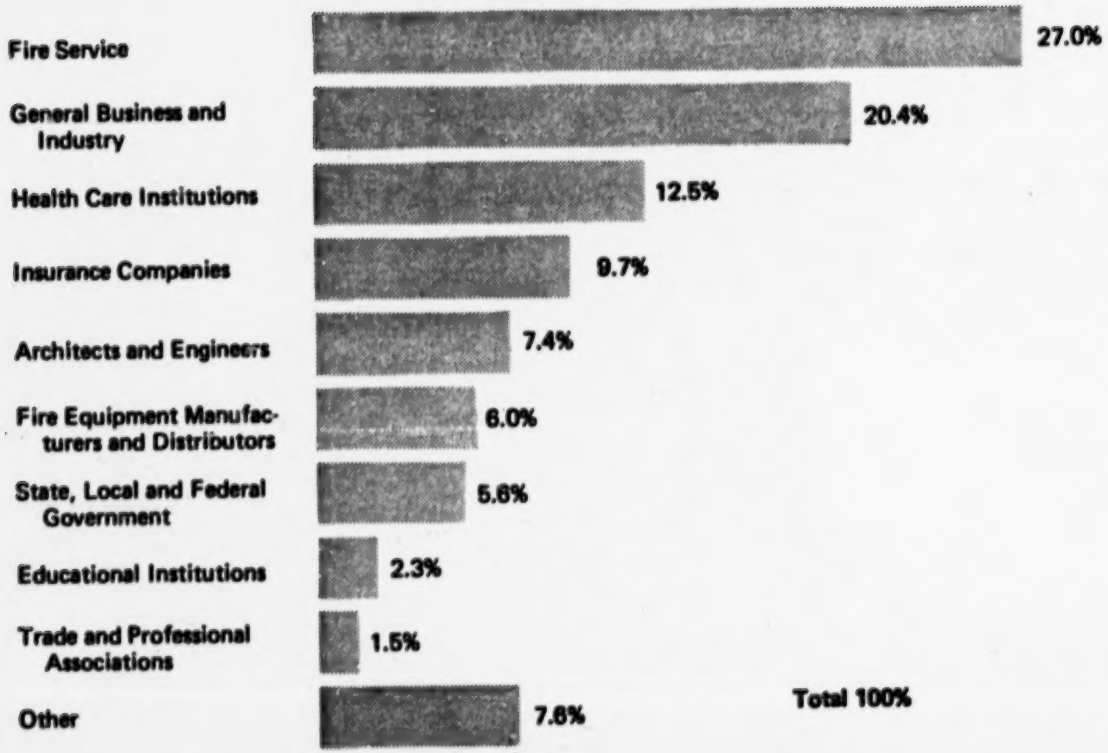
DANIEL J. PILIERO II
General Counsel
National Fire Protection
Association
WEBSTER, CHAMBERLAIN & BEAN
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 785-9500

Of Counsel:

MYRREL C. HENDRICKS, JR.
PAUL H. NETTESHEIM
WEBSTER, CHAMBERLAIN & BEAN
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 785-9500

APPENDIX I

NFPA's MEMBERSHIP COMPOSITION



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CLERK

No. 80-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,
Petitioner,

v.

HYDROLEVEL CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL INSTITUTE OF BUILDING SCIENCES IN SUPPORT OF THE PETITION FOR CERTIORARI

CALVIN H. COBB, JR.
(Counsel of Record)
ELLEN M. MCNAMARA
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-2200
Attorneys for *Amicus Curiae*
National Institute of Building Sciences

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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---

BRIEF *AMICUS CURIAE* OF THE NATIONAL INSTITUTE OF BUILDING SCIENCES IN SUPPORT OF THE PETITION FOR CERTIORARI

The National Institute of Building Sciences (the "Institute"), with the consent of all parties, files this brief *amicus curiae* in support of the petition filed by The American Society of Mechanical Engineers, Inc. for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.*

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* The written consents of counsel for the parties have been filed with the Clerk of the Court.

INTEREST OF *AMICUS CURIAE*

The National Institute of Building Sciences was created pursuant to Section 809 of the Housing and Community Development Act of 1974, Pub. L. 93-383, 12 U.S.C. Section 1701j-2.* The Institute is exempt from federal taxation under Section 501(c)(3) of the Internal Revenue Code. The Board of Directors of the Institute, during its first five years of existence, has, pursuant to its enabling statute, been appointed by the President of the United States with the advice and consent of the United States Senate.

The Institute's mission is set forth in its enabling statute. Congress therein declared the need for ". . . an authoritative national source to make findings and to advise both the public and private sectors of the economy with respect to the use of building science and technology in achieving nationally acceptable standards and other technical provisions for use in Federal, State, and local housing and building regulations . . . ." § 809(a)(1), Pub. L. 93-383. To fulfill this important national objective, Congress authorized the establishment of "an appropriate nonprofit, nongovernmental instrument to be known as the National Institute of Building Sciences . . . ." § 809(b)(1), Pub. L. 93-383.** The Institute's functions and responsibilities relating to building regulations, as set forth in its enabling statute, are as follows:

> (A) Development, promulgation, and maintenance of nationally recognized performance criteria, standards, and other technical provisions for maintenance

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* For the convenience of the Court, Section 809 of Pub. L. 93-383 is set forth as an Appendix hereto.

** This section also provided in substance that the Institute might elect to receive a Congressional charter or to incorporate under the District of Columbia Non-Profit Corporation Act. The Institute chose to incorporate under District of Columbia law on August 6, 1976.

of life, safety, health, and public welfare suitable for adoption by building regulating jurisdictions and agencies, including test methods and other evaluative techniques relating to building systems, subsystems, components, products, and materials with due regard for consumer problems.

(B) Evaluation and prequalification of existing and new building technology in accordance with subparagraph (A).

(C) Conduct of needed investigations in direct support of subparagraphs (A) and (B).

(D) Assembly, storage, and dissemination of technical data and other information directly related to subparagraphs (A), (B), and (C).

§ 809(e)(1), Pub. L. 93-383.

While the Institute itself is not a voluntary membership organization, Congress directed that the Institute establish a voluntary membership affiliate. The statute expressly requires that "the Institute shall establish . . . a Consultative Council, membership in which shall be available to representatives of all appropriate private trade, professional, and labor organizations, private and public standards, codes, and testing bodies, public regulatory agencies, and consumer groups, so as to insure a direct line of communication between such groups and the Institute and a vehicle for representative hearings on matters before the Institute." § 809(c)(8), Pub. L. 93-383. In accordance with the intent of Congress, the Consultative Council, then, consisting of voluntary representatives of the broad spectrum of public interest and disciplines interested in or affected by building criteria and standards, is the volunteer vehicle through which these objectives are accomplished.

In addition, Congress directed that the Institute, in exercising its functions and responsibilities "shall assign

and delegate, to the maximum extent possible, responsibility for conducting each of the needed activities . . . to one or more of the private organizations, institutions, agencies, and Federal and governmental entities with a capacity to exercise or contribute to the exercise of such responsibility, monitor the performance achieved through assignment and delegation, and, when deemed necessary, reassign and delegate such responsibility." § 809(e)(2), Pub. L. 93-383. Consistent with this directive, the Institute also depends upon the voluntary input of various public and private entities to fulfill its statutory responsibilities.

It is clear, therefore, that the Institute has a compelling interest in matters affecting the liability of nonprofit organizations for the unauthorized actions of their volunteer members taken, not for the benefit of the organization, but for the benefit of those members or their employers. The Institute is especially concerned in light of its obligation to carry out the will of Congress in part by delegation and in part through reliance upon the Consultative Council, which is composed of approximately 800 volunteers from the various segments of the building community who, in many instances, will have private and potentially conflicting interests.

The extent to which the Institute or its Consultative Council may be exposed to liability for any illegal or unauthorized conduct on the part of Consultative Council members may significantly undermine its ability to fulfill the important national objectives set forth by Congress in its authorizing legislation.

SUMMARY OF ARGUMENT

Volunteer, nonprofit organizations cannot reasonably protect themselves against disloyal members who exploit their volunteer positions to commit illegal and unauthorized acts against third parties, while concealing their conflicts of interest and their intentions of fostering

interests other than those of the organization. Therefore, and especially since the work of such organizations is in the public interest, they should not be liable for actions of volunteer members when (a) the acts are neither authorized nor ratified by the organization, (b) the members do not intend to, and do not in fact, benefit the organization by their actions, and (c) the members actively deceive the organization for their own purposes and benefit.

ARGUMENT

THE DECISION BELOW, IF ALLOWED TO STAND, WOULD SERIOUSLY AFFECT THE ABILITY OF NONPROFIT ORGANIZATIONS TO PERFORM THEIR FUNCTIONS IN THE PUBLIC INTEREST.

The Institute respectfully submits that the work of voluntary organizations effectively would be crippled if they may incur liability for actions of disloyal volunteer members who improperly utilize their positions to advance unlawfully their personal interests, or those of their employers, where (a) the acts are neither authorized nor ratified by the organization, (b) the disloyal members do not intend to, and do not in fact, benefit the organization, and (c) such members actively deceive the organization to accomplish their improper objectives.

There is little question but that volunteerism in America—and particularly the voluntary housing building criteria, standards and model code system—is the envy of much of the world. In no other way has any nation been able to bring so much volunteer talent and dedicated individual effort to the advancement of technology and improvement of the quality of life without undesirable governmental intervention. By authorizing the establishment of the Institute as a private, nongovernmental entity, and in encouraging continuation of other private activity in the field, the Congress of the United States has recognized this. *See* § 809(a)(2), Pub. L. 93-383.

The informed and balanced judgments of volunteer individuals are vital to the Institute's accomplishment of its statutory mission. Complex issues such as the appropriate measures of housing and building performance, the thresholds of human and environmental tolerance and/or satisfaction, the acceptable levels of risk, and the adequacy of methods of performance prediction rarely can be completely resolved by scientific methods alone. But such questions must be resolved if society is to sustain itself and advance; to achieve such resolution, persons of knowledge and judgment must make decisions. The requisite expertise may be found in government, in industry, in the professions, in the trades, in the ranks of the owner/user, in academia, and elsewhere in the community. But because of the expense that otherwise would be associated with assembling large numbers of persons with specialized expertise and balancing points of view, voluntary participation by those with the needed talent is necessary to provide the information and debate that is vital to this process of resolution.

In order to gain credibility, organizations dealing with the development of voluntary standards should be diverse and broadly inclusive. No affected group or discipline should feel excluded. The Institute, for example, has no limit on membership on its Consultative Council, which presently has approximately 800 members.

The Institute recognizes that a voluntary organization must be responsible for its actions. This is especially true of voluntary organizations that develop or deal with criteria and standards which enjoy wide acceptance and are broadly relied upon in both the public and private sectors of the economy. The matter of volunteer organizations' responsibility for their actions, or for the duly authorized actions of their agents, however, is a quite different matter from that presently at bar. No question is raised here as to the liability of the individual

or individuals involved or their true principals. Rather, the issue presented is whether a volunteer organization can be engaged in a conspiracy violative of the antitrust laws when it is unaware of any unlawful act being perpetrated by any of its members and when such act could in no respect redound to the benefit of the organization. To hold that an organization is engaged in an unlawful conspiracy by "unintentional participation" or "apparent authority," would unduly and most unfairly burden the volunteer organization system. Indeed, the implications of the decision below are applicable not only to matters of antitrust law, but are susceptible of being extended to cases involving defamation, disparagement and other torts.

Voluntary organizations, of course, should structure their deliberative and judgmental bodies so as to avoid conflicts of interest or so that potential conflicts are fully known to everyone concerned. Every voluntary organization should have internal review procedures to ensure to the maximum extent feasible that the result of its work is a representative product of the institution, free from undisclosed bias. Such organizations should have policies and procedures, as does the Institute, based on concepts of open participation, disclosure, and checks and balances. But to require flawless operation is not realistic—individuals may choose not to participate fairly or may not provide full disclosure as to their potential conflicts or bias, and checks and balances may fail. No voluntary membership organization—however strong its desire for integrity and objectivity—can establish controls that will preclude any unfair bias or improper act by any of its members, or prevent any member from evading the organization's control or review procedures.

It is respectfully submitted that the work of voluntary organizations will be unreasonably inhibited if they are to be held liable for acts of individual members who

victimize the organization as well as others when they abuse their volunteer positions by concealing conflicts of interest and deliberately use their positions improperly to advance their personal or their employers' interests rather than those of the organization. No procedure can truly prevent a wrong-doing member from improperly exploiting his position in the volunteer organization and deceiving the organization to his own benefit or that of his true principal, if he is so disposed. As a practical matter, therefore, volunteer organizations simply are not able to protect themselves with certainty against such deceptive abuse, no matter what review procedures they maintain, if the test of agency is "apparent authority" as incorrectly perceived by a third party, rather than as held out to the third party by the principal. In cases such as that at bar, the wrongdoers really are functioning only as agents of their employers, and not of the volunteer organization.

The Institute respectfully submits that its ability to carry out the mandate of Congress would be jeopardized if it were to be exposed to liability for acts of volunteer members of its Consultative Council were they to conceal their conflicts of interest, take actions advancing their personal interests rather than those of the Institute, while improperly representing to others that they have authority to speak definitively for the Institute or its Consultative Council.

Thus the decision of the Second Circuit Court of Appeals, if allowed to stand, could have a serious adverse impact upon the ability of the Institute to carry out its fundamental mission—to work through volunteer participants in both the public and private sectors of the economy to bring about a more rational housing and building regulatory environment—Federal, State and local.

CONCLUSION

For the foregoing reasons, the petition of The American Society of Mechanical Engineers, Inc. for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

CALVIN H. COBB, JR.
(Counsel of Record)
ELLEN M. MCNAMARA
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-2200
Attorneys for *Amicus Curiae*
National Institute of Building Sciences

APPENDIX

APPENDIX

Public Law 93-383
93rd Congress, S. 3066
August 22, 1974

AN ACT

To establish a program of community development block grants, to amend and extend laws relating to housing and urban development, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Housing and Community Development Act of 1974".

* * * *

TITLE VIII—MISCELLANEOUS

* * * *

88 Stat. 729

NATIONAL INSTITUTE OF BUILDING SCIENCES

SEC. 809. (a)(1) The Congress finds (A) that the lack of an authoritative national source to make findings and to advise both the public and private sectors of the economy with respect to the use of building science and technology in achieving nationally acceptable standards and other technical provision for use in Federal, State, and local housing and building regulations is an obstacle to efforts by and imposes severe burdens upon all those who procure, design, construct, use, operate, maintain, and retire physical facilities, and frequently results in the failure to take full advantage of new and useful developments in technology which could improve our living environment; (B) that the establishment of model buildings codes or of a single national building code will not completely resolve the problem because of the difficulty at all

levels of government in updating their housing and building regulations to reflect new developments in technology, as well as the irregularities and inconsistencies which arise in applying such requirements to particular localities or special local conditions; (C) that the lack of uniform housing and building regulatory provisions increases the costs of construction and thereby reduces the amount of housing and other community facilities which can be provided; and (D) that the existence of a single authoritative nationally recognized institution to provide for the evaluation of new technology could facilitate introduction of such innovations and their acceptance at the Federal, State, and local levels.

(2) The Congress further finds, however, that while an authoritative source of technical findings is needed, various private organizations and institutions, private industry, labor, and Federal and other governmental agencies and entities are presently engaged in building research, technology development, testing, and evaluation, standards and model code development and promulgation, and information dissemination. These existing activities should be encouraged and these capabilities effectively utilized wherever possible and appropriate to the purposes of this section.

(3) The Congress declares that an authoritative nongovernmental instrument needs to be created to address the problems and issues described in paragraph (1), that the creation of such an instrument should be initiated by the Government, with the advice and assistance of the National Academy of Sciences-National Academy of Engineering-National Research Council (hereinafter referred to as the "Academies-Research Council") and of the various sectors of the building community, including labor and management, technical experts in building science and technology, and the various levels of government.

(b) (1) There is authorized to be established, for the purposes described in subsection (a) (3), an appropriate

nonprofit, nongovernmental instrument to be known as the National Institute of Building Sciences (hereinafter referred to as the "Institute"), which shall not be an agency or establishment of the United States Government. The Institute shall be subject to the provisions of this section and, to the extent consistent with this section, to a charter of the Congress if such a charter is requested and issued or to the District of Columbia Non-profit Corporation Act if that is deemed preferable.

(2) The Academies-Research Council, along with other agencies and organizations which are knowledgeable in the field of building technology, shall advise and assist in (A) the establishment of the Institute; (B) the development of an organizational framework to encourage and provide for the maximum feasible participation of public and private scientific, technical, and financial organizations, institutions, and agencies now engaged in activities pertinent to the development, promulgation, and maintenance of performance criteria, standards, and other technical provisions for building codes and other regulations; and (C) the promulgation of appropriate organizational rules and procedures including those for the selection and operation of a technical staff, such rules and procedures to be based upon the primary object of promoting the public interest and insuring that the widest possible variety of interests and experience essential to the functions of the Institute are represented in the Institute's operations. Recommendations of the Academies-Research Council shall be based upon consultations with and recommendations from various private organizations and institutions, labor, private industry, and governmental agencies entities operating in the field, and the Consultative Council as provided for under subsection (c) (8).

(3) Nothing in this section shall be construed as expressing the intent of the Congress that the Academies-Research Council itself be required to assume any func-

tion or operation vested in the Institute by or under this section.

(c) (1) The Institute shall have a Board of Directors (hereinafter referred to as the "Board") consisting of not less than fifteen nor more than twenty-one members, appointed by the President of the United States by and with the advice and consent of the Senate. The Board shall be representative of the various segments of the building community, of the various regions of the country, and of the consumers who are or would be affected by actions taken in the exercise of the functions and responsibilities of the Institute, and shall include (A) representatives of the construction industry, including representatives of construction labor organizations, product manufacturers, and builders, housing management experts, and experts in building standards, codes, and fire safety, and (B) members representative of the public interest in such numbers as may be necessary to assure that a majority of the members of the Board represent the public interest and that there is adequate consideration by the Institute of consumer interests in the exercise of its functions and responsibilities. Those representing the public interest on the Board shall include architects, professional engineers, officials of Federal, State, and local agencies, and representatives of consumer organizations. Such members of the Board shall hold no financial interest or membership in, nor be employed by, or receive other compensation from, any company, association, or other group associated with the manufacture, distribution, installation, or maintenance of specialized building products, equipment, systems, subsystems, or other construction materials and techniques for which there are available substitutes.

(2) The members of the initial Board shall serve as incorporators and shall take whatever actions are necessary to establish the Institute as provided for under subsection (b) (1).

(3) The term of office of each member of the initial and succeeding Boards shall be three years; except that (A) any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term; and (B) the terms of office of members first taking office shall begin on the date of incorporation and shall expire, as designated at the time of their appointment, one-third at the end of one year, one-third at the end of two years, and one-third at the end of three years. No member shall be eligible to serve in excess of three consecutive terms of three years each. Notwithstanding the preceding provisions of this subsection, a member whose term has expired may serve until his successor has qualified.

(4) Any vacancy in the initial and succeeding Boards shall not affect its power, but shall be filled in the manner in which the original appointments were made, or, after the first five years of operation, as provided for by the organizational rules and procedures of the Institute.

(5) The President shall designate one of the members appointed to the initial Board as Chairman; thereafter, the members of the initial and succeeding Boards shall annually elect one of their number as Chairman. The members of the Board shall also elect one or more of their Members as Vice Chairman. Terms of the Chairman and Vice Chairman shall be for one year and no individual shall serve as Chairman or Vice Chairman for more than two consecutive terms.

(6) The members of the initial or succeeding Boards shall not, by reason of such membership, be deemed to be employees of the United States Government. They shall, while attending meetings of the Board or while engaged in duties related to such meetings or in other activities of the Board pursuant to this section, be entitled to receive compensation at the rate of $100 per day including

traveltime, and while away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, equal to that authorized under section 5703 of title 5, United States Code, for persons in the Government service employed intermittently.

(7) The Institute shall have a president and such other executive officers and employees as may be appointed by the Board at rates of compensation fixed by the Board. No such executive officer or employee may receive any salary or other compensation from any source other than the Institute during the period of his employment by the Institute.

(8) The Institute shall establish, with the advice and assistance of the Academies-Research Council and other agencies and organizations which are knowledgeable in the field of building technology, a Consultative Council, membership in which shall be available to representatives of all appropriate private trade, professional, and labor organizations, private and public standards, code, and testing bodies, public regulatory agencies, and consumer groups, so as to insure a direct line of communication between such groups and the Institute and a vehicle for representative hearings on matters before the Institute.

(d) (1) The Institute shall have no power to issue any shares of stock, or to declare or pay any dividends.

(2) No part of the income or assets of the Institute shall inure to the benefit of any director, officer, employee, or other individual except as salary or reasonable compensation for services.

(3) The Institute shall not contribute to or otherwise support any political party or candidate for elective public office.

(e) (1) The Institute shall exercise its functions and responsibilities in four general areas, relating to building regulations, as follows:

(A) Development, promulgation, and maintenance of nationally recognized performance criteria, standards, and other technical provisions for maintenance of life, safety, health, and public welfare suitable for adoption by building regulating jurisdictions and agencies, including test methods and other evaluative techniques relating to building systems, subsystems, components, products, and materials with due regard for consumer problems.

(B) Evaluation and prequalification of existing and new building technology in accordance with subparagraph (A).

(C) Conduct of needed investigations in direct support of subparagraphs (A) and (B).

(D) Assembly, storage, and dissemination of technical data and other information directly related to subparagraphs (A), (B), and (C).

(2) The Institute in exercising its functions and responsibilities described in paragraph (1) shall assign and delegate, to the maximum extent possible, responsibility for conducting each of the needed activities described in paragraph (1) to one or more of the private organizations, institutions, agencies, and Federal and other governmental entities with a capacity to exercise or contribute to the exercise of such responsibility, monitor the performance achieved through assignment and delegation, and, when deemed necessary, reassign and delegate such responsibility.

(3) The Institute in exercising its functions and responsibilities under paragraphs (1) and (2) shall (A) give particular attention to the development of methods for encouraging all sectors of the economy to cooperate with the Institute and to accept and use its technical findings, and to accept and use the nationally recognized performance criteria, standards, and other technical pro-

visions developed for use in Federal, State, and local building codes and other regulations which result from the program of the Institute; (B) seek to assure that its actions are coordinated with related requirements which are imposed in connection with community and environmental development generally; and (C) consult with the Department of Justice and other agencies of government to the extent necessary to insure that the national interest is protected and promoted in the exercise of its functions and responsibilities.

(f) (1) The Institute is authorized to accept contracts and grants from Federal, State, and local governmental agencies and other entities, and grants and donations from private organizations, institutions, and individuals.

(2) The Institute may, in accordance with rates and schedules established with guidance as provided under subsection (b) (2), establish fees and other charges for services provided by the Institute or under its authorization.

(3) Amounts received by the Institute under this section shall be in addition to any amounts which may be apropriated to provide its initial operating capital under subsection (h).

(g) (1) Every department, agency, and establishment of the Federal Government, in carrying out any building or construction, or any building- or construction-related programs, which involves direct expenditures, and in developing technical requirements for any such building or construction, shall be encouraged to accept the technical findings of the Institute, or any nationally recognized performance criteria, standards, and other technical provisions for building regulations brought about by the Institute, which may be applicable.

(2) All projects and programs involving Federal assistance in the form of loans, grants, guarantees, insur-

ance, or technical aid, or in any other form, shall be encouraged to accept, use, and comply with any of the technical findings of the Institute, or any nationally recognized performance criteria, standards, and other technical provisions for building codes and other regulations brought about by the Institute, which may be applicable to the purposes for which the assistance is to be used.

(3) Every department, agency, and establishment of the Federal Government having responsibility for building or construction, or for building- or construction-related programs, is authorized and encouraged to request authorization and appropriations for grants to the Institute for its general support, and is authorized to contract with and accept contracts from the Institute for specific services where deemed appropriate by the responsible Federal official involved.

(4) The Institute shall establish and carry on a specific and continuing program of cooperation with the States and their political subdivisions designed to encourage their acceptance and its technical findings and of nationally recognized performance criteria, standards, and other technical provisions for building regulations brought about by the Institute. Such program shall include (A) efforts to encourage any changes in existing State and local law to utilize or embody such findings and regulatory provisions; and (B) assistance to States in the development of inservice training programs for building officials, and in the establishment of fully staffed and qualified State technical agencies to advise local officials on questions of technical interpretation.

(h) There is authorized to be appropriated to the Institute not to exceed $5,000,000 for the fiscal year 1975, and $5,000,000 for the fiscal year 1976 (with each appropriation to be available until expended), to provide the Institute with initial capital adequate for the exercise of its functions and responsibilities during such

years; and thereafter the Institute shall be financially self-sustaining through the means described in subsection (f).

(i) The Institute shall submit an annual report for the preceding fiscal year to the President for transmittal to the Congress within sixty days of its receipt. The report shall include a comprehensive and detailed report of the Institute's operations, activities, financial condition, and accomplishments under this section and may include such recommendations as the Institute deems appropriate.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,
Petitioner,

v.

HYDROLEVEL CORPORATION,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS

MILTON F. LUNCH
2029 K Street, N.W.
Washington, D.C. 20006
202/463-2343
Attorney for National Society of Professional Engineers

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

The *amicus curiae* adopts the statement of questions presented by the petitioner, The American Society of Mechanical Engineers, Inc.

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BRIEF *AMICUS CURIAE* OF THE NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 36 (1) of the Rules of this Court, the National Society of Professional Engineers ("NSPE") submits this brief as *amicus curiae* supporting the Petition for A Writ of Certiorari in this case.

The written consents of counsel for the petitioner, The American Society of Mechanical Engineers, and the respondent, Hydrolevel Corporation, have been filed with the Clerk of the Court.

INTEREST OF THE *AMICUS CURIAE*

1. The NSPE is a non-profit organization composed of over 80,000 members through 53 affiliated state organizations (including the District of Columbia, Puerto Rico and Guam) and approximately 500 local chapters. Its membership includes professional engineers engaged in virtually every specialized branch of engineering practice and activity—in industry, private practice, government, and education. From its inception, the NSPE has sought to bring to the attention of courts, administrative agencies, and apropriate committees of Congress, information and data concerning the impact of federal laws, rules and policies upon the public and upon the engineering profession.

2. A significant number of NSPE members are engaged in engineering and business-related activities which relate to, and rely in substantial part on, use of various technical codes and standards adopted and interpreted by private organizations, similar in scope and purpose to the types of codes promulgated by the petitioner in this case. The legal principles involved in this case are of a nature which will have major impact on the future development and use of technical codes in the United States, and will thereby be of major concern to the members of NSPE and other engineers who rely upon such technical codes.

3. In addition to the effect of the decision below on technical code development and use, the legal standard of responsibility and liability stated in the decision of the Court of Appeals portends serious concern for NSPE and other similarly situated professional organizations with regard to potential liability for unauthorized acts of its volunteer members in carrying out the functions of the organization in non-technical professional matters.

STATEMENT OF THE CASE

The facts of this case are fully set forth in the Petition for A Writ of Certiorari of the Petitioner, and are adopted by the *amicus curiae.*

SUMMARY OF ARGUMENT

The petition for plenary review of this case should be granted because it raises novel and major issues of interpretation of the Sherman Act relative to the liability exposure of non-profit, voluntary professional organizations for the unauthorized acts of their members. If the decision of the Court of Appeals in this case is, indeed, the proper interpretation of the antitrust laws, the legal principle thereby established will have serious effects upon the ability of such organizations to engage in traditional activities which have as their purpose the establishment of codes and standards necessary to carry forward technological advancement in the United States.

The case before the Court is an appropriate one under its clear facts to enable the Court to provide guidance for non-profit voluntary member organizations in their future activities in the development and application of technical codes and standards, as well as other non-technical activities which impinge upon services and programs of such organizations related to serving the public health, safety and welfare.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS IS VAGUE AND UNCERTAIN IN ESTABLISHING A STANDARD OF CONDUCT WHICH CAN BE RELIED UPON BY ORGANIZATIONS AFFECTED BY THE LEGAL PRINCIPLE AT ISSUE. GUIDANCE FROM THIS COURT IS ESSENTIAL TO DEFINE THE ACTUAL OR POTENTIAL LIABILITY EXPOSURE OF ORGANIZATIONS ENGAGED IN THE ESSENTIAL VOLUNTARY STANDARDS SYSTEM OF THE UNITED STATES.

As noted by the decision of the Court of Appeals in this case, technical codes and standards ". . . have great influence in the [engineering] profession and the marketplace." 635 F. 2d 118, at 121. Indeed, it is no exaggeration to say that the technological progress of the United States in the past hundred years, or more, has rested in substantial part on the development and use of the voluntary standards system.

The Federal Government itself relies heavily upon technical standards promulgated by the many voluntary standards bodies. Circular A-119, issued by the Office of Management and Budget on January 17, 1980, entitled, "Federal Participation in the Development and Use of Voluntary Standards," recognized ". . . a policy encouraging the participation of Federal agencies and their representatives in voluntary standards bodies which conduct their standards activities in accordance with specified due process and other criteria . . ." See Vol. 45, p. 37374, *Federal Register*, June 2, 1980.

The language of § 1 of the Sherman Act, barring and making illegal agreements or actions ". . . in restraint of trade . . ." is exceedingly broad, and has necessarily been the subject of numerous decisions by this Court placing substantive meaning on those bare words under specific facts on a case-by-case basis. This case is an appro-

priate one for such treatment to establish and define the meaning of the broad language of the Sherman Act on the unresolved issue of whether the type of conduct involved in this case is within the contemplation of the Sherman Act when the misconduct of volunteer members of an organization, not sanctioned or embraced by the organization itself, or for the benefit of the organization, is the basis for a finding of a violation of § 1 of the Sherman Act.

As recently noted by this Court, "In antitrust, the federal courts enjoy more flexibility and act more as common-law courts than in other areas governed by federal statute." *Northwest Airlines, Inc.* v. *Transport Workers Union*, —— U.S. ——, n. 42, Docket No. 79-1056, decided April 20, 1981.

The case before the Court is such a case which lends itself to the flexibility required to resolve the important issue of organizational liability for self-serving acts of its volunteer members serving on committees which carry out functions of the organization.

II. THE LEGAL PRINCIPLES INVOLVED IN THIS CASE EXTEND BEYOND AN IMPACT ON TECHNICAL STANDARDS AND CODES. THE "APPARENT AUTHORITY" BASIS RELIED UPON BY THE COURT OF APPEALS MAKES VULNERABLE A MULTITUDE OF PROFESSIONAL SOCIETY PROGRAMS.

If extended to its logical conclusion, the use of the "apparent authority" test employed by the Court of Appeals, raises a considerable concern that many activities of professional societies, over and above technical standards and codes activities, could subject the organization to antitrust liability for improper and unauthorized conduct of its members in carrying out socially desirable programs in the public interest.

It is not beyond reasonable conjecture that programs involving voluntary certification of qualifications, or interpretation of professional codes of ethics by judicial-type boards for guidance of the members of the profession could conceivably be the subject of abuse for personal gain by one or more members of the committee designated to perform those functions for the organization.

It would be literally impossible for professional societies engaged in a multiplicity of activities of the type indicated to establish an internal review or monitoring procedure to be certain that members of the activity committee do not have ulterior motives.

The more reasonable and proper standard in the event of abuse of the responsibility and authority granted the volunteer society member serving in such capacity should run to the individual(s) who act without actual or implied authority to issue opinions or make rulings which are tantamount to a restraint of trade. To hold the organization itself liable for antitrust penalties in such circumstances must necessarily cast a cloud over continuation of socially desirable areas of professional activity.

CONCLUSION

For the foregoing reasons, the petition for A Writ of Certiorari should be granted.

Respectfully submitted,

MILTON F. LUNCH
2029 K Street, N.W.
Washington, D.C. 20006
202/463-2343

Attorney for National Society of Professional Engineers

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MEMORANDUM OF THE SOCIETY OF MANUFACTURING ENGINEERS AS AMICUS CURIAE

GEORGE D. WEBSTER*
RICHARD H. MANSFIELD, III
WEBSTER, CHAMBERLAIN, & BEAN
1747 Pennsylvania Ave., N.W.
Suite 1000
Washington, D.C. 20006
(202) 785-9500

Attorneys for Amicus Curiae

**Counsel of Record*

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MEMORANDUM OF THE SOCIETY OF MANUFACTURING ENGINEERS AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Society of Manufacturing Engineers ("SME"), of Dearborn, Michigan was founded in 1932, and is a non-profit volunteer organization exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. The purpose for which SME was founded is to promote and actively engage in research, writing, publishing and disseminating knowledge within the field of manufactur-

ing engineering. SME is the parent association of four sub-associations: Robotics International of SME; Computer and Automated Systems Association of SME; Association for Finishing Processes of SME and the North America Manufacturing Research Institution of SME. Collectively, these groups have over 60,000 individual members, who are predominantly engineers.

SME's services to its members are somewhat different in nature than those afforded by Petitioner to its members. In addition to offering continuing education to engineers, ASME develops standards[1] and guidelines involving both consumer and commercial products and tools of the trade used by engineers and manufacturers. SME, on the other hand, is almost exclusively concerned with the publication and dissemination of information to its members. Toward this end, SME publishes books and journals and holds over 150 technical meetings annually designed to inform members of new advances in the field of manufacturing.

A quarterly journal called *Robotics Today* is published by SME as is a monthly magazine entitled *Manufacturing Engineering*, which has a circulation of over 100,000. Largely through efforts of its volunteers, SME arranges from twenty to twenty-five educational expositions per year, both in the United States and abroad. These educational expositions are for the benefit

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[1] The holding below is certain to have numerous adverse affects on voluntary membership associations involved in promulgating standards. A standard is a description published by an association, detailing in layman's terms, certain characteristics of products. Standards are helpful both to consumers and manufacturers alike since they make available useful information concerning the safe use and construction of products. Such topics as strength, safety and performance are addressed in a typical standard.

of engineers and manufacturers and typically exhibit new equipment from several hundred sponsoring companies in those fields.

SME maintains 235 chapters around the world, as well as 86 subchapters and 97 student chapters.

The present case presents an unconventional and potentially harmful precedent as to the antitrust liability of professional associations. SME and many other associations stand to suffer great losses both in the voluntary support of individual members and in the operation of services unless the panel's decision is reviewed and overturned. As the arguments which follow point out, there would be too many risks of liability involved in serving a professional organization if the reasoning of the Second Circuit is allowed to prevail. SME believes that its experience and comments will provide this Court with helpful insight in addressing the issues raised.

INTRODUCTION AND SUMMARY OF ARGUMENT

The present case raises significant questions both as to the liability of professional associations for the unlawful acts of their agents, who while acting within the scope of apparent authority, violate antitrust laws, and as to the meaning of such terms as "contract," "combination" and "conspiracy" as those terms apply to antitrust litigation.

The Court of Appeals decision, by establishing a new standard for determining antitrust liability, will undermine the nature of professional associations which depend on the voluntary participation of their members. Moreover, since this new standard is derived from an intentional tort nexus which until now has been inap-

plicable to an association's "unintentional participation" in an antitrust conspiracy, it is unclear how it will work out in practice.

If allowed to stand, the decision of the Second Circuit will invite a multitude of lawsuits against voluntary associations and cause confusion among such organizations and the public as to the extent of potential liability of associations and their volunteers. The Court must assess whether such additional litigation and uncertainty is desirable or necessary in light of the already burdened condition of the judicial system and of the sound principles of agency law which presently exist and which have guided the activities of professional associations for decades.

ARGUMENT

I. This Court Should Grant Certiorari To Determine The Standard Of Liability Appropriate For A Professional Association Whose Members Conspire To Violate The Antitrust Laws Without The Knowledge Or Support Of The Association And Without Intending To Benefit The Organization.

Of universal concern to professional associations, including SME, is the impact of the panel's decision on the ability of such organizations to function normally without fear of unfounded antitrust reprisals. Specifically, the sweeping abandonment of established case law defining the conditions under which a voluntary association may be held liable for violations of the Sherman Act necessitates further judicial review of the principles set forth by the panel.

For decades, associations have relied on the premise that where an agent acts unlawfully without intending to

benefit his principal, the principal cannot, without ratifying those acts, be held accountable for them. *See*, e.g., *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U.S. 344 (1922); *United States* v. *Hilton Hotels Corp.*, 467 F. 2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); These decisions agree that there must exist some kind of actual authority on the part of, or benefit accruing to, the principal before liability can arise. An alternative requirement, as, for example, when an organization ratifies the unlawful act of one of its agents thereby condoning it, is based on sound and established agency principles. The panel, through a novel gloss on the law of agency, now seeks, to change the standard of liability whereby a principal would be liable for unlawful behavior of agents who act within the scope of apparent authority. Its reasoning depends largely on narrow agency and tort precepts that have never before been applied to the antitrust arena. The panel would cast aside the ruling case law in this area, including important decisions by this Court, in favor of a standard which depends for its credibility on misapplied examples in the Restatement 2d of Agency and on one decision involving a bill of lading which has nothing whatever to do with antitrust law.

A rule of law establishing liability without fault in antitrust cases would call into question the very meaning of the requirement that those charged with violation of the Sherman Act must form a "conspiracy," "contract" or "combination." This Court has held on numerous occasions that in order to have a conspiracy or combination, there must be a "unity of purpose" or "common design," *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946); or "*at least* the degree of criminal intent necessary for the substantive

offense itself." *Ingram* v. *United States*, 360 U.S. 672, 678 (1959). This Court has repeatedly held that no contract, combination, or conspiracy can exist for purposes of the Sherman Act unless there has been concerted action by two or more parties. *Cement Mfrs. Protective Ass'n.* v. *United States*, 268 U.S. 588, 602-06 (concerted action not shown and no unlawful restraint accrued); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 144 (1968) (White, J., concurring).[2] Under the panel's reasoning, an association such as SME would be held accountable for antitrust violations even if it neither participated in a common design nor performed a single critical act with a specific intent of accomplishing that act; even if it was without knowledge of the act and was incapable of benefitting from it. Thus, it could be held to violate the antitrust acts even without conspiring, contracting or forming a combination with anyone for that purpose. Since one man standing alone cannot be a conspirator, the panel's reasoning will surely lead to incongrouous results for associations such as SME.

The decision below deviates even further from classical antitrust and agency theory in its determination that ASME was an unintentional participant in its agents' conduct. (A:26, 635 F.2d at 131). A theory of negligence is out of place in antitrust law.

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[2] This principle was followed in *United States* v. *Corn Derivatives Institute*, 1932-1939 Trade Cas. ¶ 55,002 at 18 (N.D. Ill. 1932) where the court held that "the words 'acting in concert' as used in this decree shall mean by mutual agreement, understanding, plan, device, or contrivance entered into or employed by any two or more defendants. . . ."

Because the Sherman Act assesses treble damages, courts must avoid standards of liability that are illogical or confusing, and instead, apply standards that have a sound basis. To do otherwise would be to subject innocent parties to harsh and inequitable penalties.

II. Third Persons Harmed By The Illegal Acts Of Agents With Apparent Authority To Act On Behalf Of Their Principals Presently Have An Adequate Remedy.

The antitrust laws already provide a remedy for competitors injured by the acts of fellow competitors who are also officials of professional associations. In the case below, the agents acted to benefit not the American Society of Mechanical Engineers but their own corporations. The sole remedy should be against the true principle of the wrong doers: their corporate beneficiaries. Certainly, the purposes of the antitrust laws would then be more fully served. The public is not protected, indeed it is harmed, when liability is imposed on innocent parties, especially when those parties are voluntary organizations existing to maintain safety and responsibility in the market place. Punishment in such cases should be directed not at the activities of the organizations but, at the parties responsible for the harm.

III. The Court Should Grant Certiorari To Review The Impact Of The Panel's Decision On The Interpretation And Dissemination Of Professional Knowledge By Associations.

Professional associations which serve their members and the public by publishing standards and professional knowledge should not have their freedom to publish restrained simply because a few of their agents are in a position to misuse the publication process. The Second Circuit announced that "[I]mposing liability on the prin-

cipal will induce greater care to prevent misconduct by agents occupying especially sensitive or responsible positions that invite reliance" (A:14, 635 F.2d at 125). This is a potentially dangerous and overly restrictive method of curbing misconduct by agents of an association. First, it severely limits the ability of an organization to freely publish guidelines for the members it serves. If the publishers of newspapers and other periodicals were held liable for every instance of employee misconduct, few entities would be willing to take the risks involved in exercising free speech. Second, the limitations imposed by the panel would result in the type of restraint which this Court has long condemned. Though the First Amendment does not protect acts of fraud, it does assure an unfettered interchange of ideas, *Roth* v. *United States*, 354 U.S. 476 (1957) and the widest possible dissemination of information *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). This freedom would be unreasonably restrained if organizations were unable to publish the opinions and standards required by their members and the public because a novel and heretofore unaccepted standard of antitrust liability rendered all such speech too risky.

IV. The Court Should Grant Certiorari To Prevent A Burden Of Unnecessary And Time Consuming Litigation.

The panel's decision will spur litigation from associations and business organizations which in the past have relied upon well established principles of agency law. Organizations affected by the increased liability will seek redress and clarification in the courts. This litigation burden can and should be avoided. A review of the Second Circuit's opinion would provide the interpretation and clarification necessary to prevent excessive litigation.

V. The Court Should Grant Certiorari To Review The Impact The Panel's Decision Will Have On The Liability Of Voluntary Organizations.

There are persuasive legal arguments why a non-profit, voluntary membership organization should not be found liable for the unauthorized acts of its volunteers which do not benefit the association, and are taken without its knowledge. There are also important philosophical and policy implications of the panel's opinion because it significantly expands the potential liability of voluntary associations, thus potentially making it impossible for these associations to perform services for their members and the public.

A. Voluntary Associations Are Essential To The Maintenance Of Individual Freedom And The Functioning Of A Democrary.

Voluntary associations have long held a distinguished place in American history.[3] They are the outgrowth of the unprecedented freedom enjoyed by the American people, and are manifestations of the uniquely American awareness that freedom, individualism, and independence, if they are to be meaningful and enduring, must be tempered by restraint, collective action, and unselfish participation. From the American revolution through the present, voluntary professional organizations have overseen the conduct and standards of their constituent professions. In forming such organizations, Americans have prided themselves on their ability to solve problems and serve needs without prodding from a centralized state bureaucracy. Private sacrifice for public good is a concept inherent in all voluntary associations.

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[3] *See*, Webster, *The Law of Associations*, Matthew Bender, 1980 (originally published by the American Society of Association Executives, 1971), Chapter 1.

Many observers have recognized the central importance of voluntarism to a democratic society. Alexis de Tocqueville devoted an entire chapter of his *Democracy in America* to voluntary associations. Throughout this chapter, de Tocqueville marvels at the number and variety of associations that arose in America.

> "As soon as several Americans have conceived a sentiment or an idea that they want to produce before the world, they seek each other out, and when found, they unite. Thenceforth they are no longer isolated individuals, but a power conspicuous from the distance whose actions serve as an example; when it speaks, men listen."[4]

He saw a direct correlation between the myriad of associations in America and the spirit of equality that pervaded the nation. De Tocqueville realized that democracies consist of many individuals who by themselves are "independent and weak," and able to "do hardly anything for themselves."[5] He concluded that where political and economic power is decentralized, individuals have no choice but to learn some habits of acting together in the affairs of daily life;"[6]. Indeed,

> "In democratic countries, knowledge of how to combine is the mother of all other forms of knowledge; on its progress depends that of all the others. . . If men are to remain civilized or to become civilized, the art of association must develop and improve among them at the same speed as equality of conditions spreads."[7]

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[4] Alexis de Tocqueville, *Democracy in America*, edited by J. P. Mayer and Max Lerner, New York: Harper & Row, 1966, 488.

[5] De Tocqueville, 488.

[6] De Tocqueville, 488.

[7] De Tocqueville, 488.

In de Tocqueville's opinion, an association voluntarily entered into by individuals is far superior to the government in undertaking important enterprises.

> [Many of my contemporaries] claim that as the citizens become weaker and more helpless, the government must become proportionately more skillful and active, so that society should do what is no longer possible for individuals. They think that answers the whole problem, but I think them mistaken. The more government takes the place of associations, the more will individuals lose the idea of forming associations and need the government to come to their help. . . Must the public administration cope with every industrial undertaking beyond the competence of the individual citizen? . . . The morals and intelligence of a democratic people would be in as much danger as its commerce and industry if ever a government wholly usurped the place of private association.[8]

In short, de Tocqueville believed that private voluntary associations are not only more efficient than the government, but also more supportive of a vigorous, free, well-informed, and generous citizenry.

Partly as a result of de Tocqueville's observations, this Court has extended First Amendment protection to the right of association. *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *De Jonge* v. *Oregon*, 299 U.S. 353 (1937). As with freedom of speech and press, any law infringing upon an individual's right to associate is subject to strict judicial scrutiny. The fact that association has been given the full protection of the First Amendment is evidence of its supreme importance in American life.

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[8] De Tocqueville, 487.

B. The Panel's Decision Will Prevent Voluntary Associations From Serving Their Historical Functions.

The panel's decision extends the potential liability of voluntary associations to an unprecedented and dangerous degree. By the panel's reasoning, a voluntary association is liable under the Sherman Act for illegal conduct of a volunteer member, even if the association disapproves, has no knowledge or is deceived of what the member is doing, and is in no way benefitted by the member's actions. Of course, if found liable under the Sherman Act, an association will have to pay treble damages.

Adherence to the panel's reasoning will effectively put an end to many association functions since many are likely to conclude that the benefits flowing to the public from their activities do not warrant assumption of the disproportionate risks and burdens imposed by the panel's decision.

There are four issues in particular which require review of the decision below by this Court. First, if the Circuit Court's decision is allowed to stand, private organizations will be unable to contend with the administrative burden of policing each of their volunteer members to ensure that none are engaged in illicit activities. To detect wrong-doing, organizations will have to monitor all of the activities, affairs, correspondence, and transactions of all members. No voluntary association, with its limited budget and human resources, can hope to accomplish such a task. Second, organizations that presume to inspect the private business of their individual members will be less attractive to potential members. An advantage of working through a voluntary association, as opposed to the government, is the more

informal, streamlined approach it allows individuals in problem solving. Members of such organizations presently enjoy the privacy to freely exercise their professional judgment within the guidelines established by their associations. If, however, individuals are subject to constant monitoring from their organizations and are required to adhere to a series of meddlesome regulations, these advantages will significantly diminish. Third, the panel's decision will encourage potentially frivolous suits against voluntary associations. Such actions are likely to be brought by parties who lack strong positions on the merits but who nevertheless will assume the risk of litigation in hopes of winning treble damages. Even if most of these suits are unsuccessful, the costs of defending against them will be enormous. Finally, the decision will discourage volunteer efforts by individuals fearful of exposing themselves to liability, and will induce many employers to forbid their employees to participate in an organization's activities.

C. The Panel's Decision Could Deprive the Public of Many of the Practical and Philosophical Benefits Derived from Voluntary Associations.

As voluntary associations abandon their former roles in response to the panel's decision, their functions will be either discontinued altogether or assumed by federal, state, and local governments. One does not have to agree with de Tocqueville that "knowledge of how to combine is the mother of all other forms of knowledge" to see that associations are responsible for innumerable benefits to society, and that in their absence, many of the tasks businesses and individuals now take for granted will go undone. Certainly, the performance of many industries, which will be deprived of the data and technical information presently made available by associations,

will decline. This is unfortunate, for productivity is already at a low ebb in this country. The lack of ethical guidelines, meanwhile, will no doubt cause confusion among professionals and business executives.

Government assumption of association tasks is not a promising prospect. With respect to the promulgation of standards and codes, for example, no government can be expected to establish regulations of the quality and thoroughness maintained by the private organizations. The government, after all, has little familiarity with subjects as specialized as safety in the engineering profession, and would likely devote neither the time nor the money necessary to ensure the development of reasonable and sound standards. To the extent that the government could promulgate adequate standards, the taxpayer and consumer will suffer. An added layer of bureaucracy—engineers, lawyers, scientists—would be created to process, research, draft and distribute the regulations. This, of course, would increase taxes, paperwork and the overall administrative burden on the average citizen. On a practical level the government would be vastly inferior to private organizations in setting, administering, and interpreting safety standards for the mechanical engineering industry.

Aside from practical considerations, the Court must be concerned with the philosophical issues discussed by de Tocqueville. The judiciary must cast a wary eye on developments which in the long run threaten to result in government encroachment on the rights of the individual. If allowed to stand, the panel's opinion will do just that. The decision will discourage individuals associated with a particular industry or corporation from banding together in an effort to serve a vital need of that industry or profession. The resulting vacuum, if

filled at all, will be filled by government. The inevitable consequences of such a result portend a society where, due to restraints imposed upon the right of association, individuals become incapable of acting on their own behalf and where government is free to assume responsibility formerly held by voluntary organizations. The dependence on government by individuals would therefore increase, and the cycle of which de Tocqueville warned will have come true. Every such completed cycle makes the private individual slightly less independent, vigorous, and magnanimous, and the central authority slightly more cumbersome, inefficient, and overweaning. The net effect is a gain of government at the expense of private citizens.

This Court has consistently reaffirmed the principles and spirit of free association and independent organizations. Now these principles are imperiled because of the Second Circuit's decision; a decision which, if the rights of individuals to associate with one another are to remain viable, this Court must review.

CONCLUSION

For the reasons stated herein the petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE D. WEBSTER
RICHARD H. MANSFIELD III
WEBSTER, CHAMBERLAIN & BEAN
1747 Pennsylvania Avenue, N.W.
Suite 1000
Washington, D. C. 20006
(202) 785-9500

Attorneys for Amicus Curiae

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In The Supreme Court of the United States

OCTOBER TERM 1981

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., *Petitioner,*

v.

HYDROLEVEL CORPORATION, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

HAROLD R. TYLER, JR.
Attorney for the American Society of Mechanical Engineers, Inc.
30 Rockefeller Plaza
New York, New York 10112
(212) 541-4000

Of Counsel:
RICHARD D. PARSONS
FREDERICK T. DAVIS
STEVEN C. CHAREN
PATTERSON, BELKNAP, WEBB & TYLER
30 Rockefeller Plaza
New York, New York 10112

QUESTIONS PRESENTED

1. Whether a non-profit, voluntary membership organization is strictly liable under the antitrust laws for all acts of its volunteer members within the scope of their "apparent authority," when (a) the acts are neither authorized nor ratified by the organization, (b) the members did not intend to, and did not in fact, benefit the organization by their actions, and (c) the members actively deceived the organization for their own purposes and for another's benefit.

2. Whether a non-profit, voluntary membership organization may be found liable for "unintentional participation" in a conspiracy to restrain trade and to monopolize, in violation of Sections 1 and 2 of the Sherman Act, on a theory of negligence.

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No. 80-1765

In The Supreme Court of the United States

OCTOBER TERM 1981

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., *Petitioner,*

v.

HYDROLEVEL CORPORATION, *Respondent.*

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Appeals is reported at 635 F.2d 118 (2d Cir. 1980) and also appears in the Appendix to ASME's petition for a writ of certiorari at pages A-1 to A-26. The District Court filed no opinions on issues raised in this brief.

JURISDICTION

The judgment of the Court of Appeals was entered on November 24, 1980. A timely petition for rehearing, and suggestion of rehearing *en banc,* was filed by ASME on December 15, 1980. The petition and suggestion were denied on January 22, 1981. *See* page A-27 to ASME's petition for a writ of certiorari. ASME's petition for a writ of certiorari was filed on April 22, 1981 and granted on June 15, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This suit involved application of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, which are set forth at page A-28 to ASME's petition for a writ of certiorari.

STATEMENT OF THE CASE

A. The Parties

1. ***The American Society of Mechanical Engineers.*** ASME is one of the oldest and largest scientific and technical societies in the United States. It was organized in 1880 as a non-profit membership corporation and is exempted from federal taxation under § 501(c)(3) of the Internal Revenue Code. ASME conducts educational and research programs, publishes a national magazine and a number of research journals, and sponsors or co-sponsors a number of technical conferences—all devoted to the dissemination of information intended to enhance the use of mechanical engineering in the public interest.

Since shortly after its founding, ASME has also promulgated and published codes and standards in numerous areas of scientific and engineering concern. There are now more than 400 such separate codes. While ASME codes are advisory only and are not of themselves binding on anyone, many such codes have been incorporated by reference into the laws of governmental jurisdictions, including federal regulatory entities, most states, major cities, and all of the provinces of Canada. *See, e.g.,* PX 30A at Exh. H (App. 666).*

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* "PX" refers to a plaintiff's exhibit before the District Court; "DX" refers to a defendant's exhibit. Citations to the trial transcript are to the Appendix ("App.") submitted to the Court of Appeals; the official trial transcript appears at App. 80-1753. If an exhibit is reprinted in the Joint Appendix ("J.A.") submitted to this Court, the reference will be to the pages of the J.A. at which it appears. Pursuant to Court Rule 34.5, the first time that an exhibit is cited, it is followed by a citation in parentheses that includes: (1) its PX or DX number, if the exhibit appears in the J.A.; (2) the page, if any, in the Exhibit Volumes ("AX V." and "HX V.") submitted to the Court of Appeals where the exhibit is reproduced; and/or (3) the pages in the trial transcript where the exhibit was offered into evidence and, if different, also where the exhibit was admitted into evidence or otherwise ruled on by the trial judge. Subsequent citations to an exhibit will be, as appropriate, solely to pages of the J.A. or the Exhibit Volumes, if the exhibit appears in either, or to the exhibit itself if it does not.

ASME presently has more than 100,000 members, drawn from all fields in which mechanical engineers are active, including industry, academia, government, consumer groups, insurers, and other scientific and technological societies. ASME has no corporate members and all ASME members participate solely as individual professionals and not as representatives of their employers. App. 615-42. Over 10,000 volunteer members, through various committees and subcommittees, participate in writing, revising and interpreting ASME's codes, which they do as a public service without pay. A paid staff is employed to handle administrative duties.

2. ***Hydrolevel Corporation.*** Respondent Hydrolevel Corporation ("Hydrolevel") was formed in 1965 to manufacture and distribute a low-water fuel cut-off, a safety device used in virtually all water and steam boilers. Hydrolevel entered a market already shared by five established manufacturers (App. 153-74; DX BN, p.4 (App. 956-57)), never achieved significant market penetration and never operated at a profit. DX CH (AX V. 161-66; App. 956). In early 1979, the company sold all of its assets (except this lawsuit) for $86,000 "salvage" value. App. 246.

3. ***Other Defendants.*** In addition to ASME, the complaint originally named two other defendants, McDonnell & Miller, Inc. ("M&M") and Hartford Steam Boiler Inspection and Insurance Company ("Hartford").

M&M has been the country's leading manufacturer of low-water fuel cut-offs for nearly half a century, accounting for 70-85% of all sales annually. In December 1971, M&M was acquired by International Telephone & Telegraph Corporation ("ITT"), which thereafter operated M&M as part of an operating division. Hartford is the country's leading underwriter of boiler insurance.

Prior to trial, ITT (M&M) and Hartford settled the charges against them for $725,000 and $75,000, respectively, and an amended complaint was filed naming ASME as the sole defendant.

B. The Facts

Synopsis. This case focused on the issuance by ASME, and subsequent misuse by M&M, of an "unofficial" interpretation of one paragraph of one of ASME's over 400 codes. The interpretation letter, which involved a particular safety standard relating to low-water fuel cut-offs, was concocted by two employees of M&M and Hartford, John James and T.R. Hardin, who also served as volunteer members of an ASME subcommittee. The Court of Appeals found that James and Hardin deliberately caused ASME to issue a misleading letter in order to help M&M to disparage one of Hydrolevel's products and thereby gain a competitive advantage. The facts at trial showed, and the Court of Appeals assumed for purposes of its decision, that no one connected with ASME other than James and Hardin had any knowledge of the letter's purpose or hidden significance, that James and Hardin did not intend to benefit ASME by their acts, and that, in obtaining the letter, James and Hardin not only concealed their true motives from ASME but acted disloyally to ASME. Nevertheless, the Court of Appeals held ASME liable under the antitrust laws as an "unintentional" conspirator against Hydrolevel solely because the acts of the two disloyal volunteer members were within the scope of their "apparent authority" on behalf of ASME. Based on this legal reasoning, it affirmed a jury's finding of liability against ASME, although remanding for a new trial on damages.

1. ***The Low-Water Fuel Cut-Off.*** Boilers generally include a device that automatically cuts off the fuel supply—and thus shuts down the boiler—before the water in the boiler falls to a dangerously low level. If a cut-off device fails to operate, it may result in "dry firing"—that is, operation of the boiler without a sufficient supply of water to moderate temperature. Dry firing can result in an explosion causing injury to persons or property. App. 169, 928.

For many years, M&M manufactured a mechanically operated cut-off which functioned on a "float" principle. If the water in a boiler drops below a critical level, a float cut-off falls, tripping a switch that cuts off the fuel supply.

Hydrolevel manufactured an electrically activated cut-off of the so-called "probe" variety. With a probe type cut-off, when water in the vessel maintains a certain level, water covers an electrode, thus completing a circuit activating the fuel supply. If the water falls below the electrode, the circuit is broken and the fuel supply is cut off. One difficulty with the probe cut-off is that, when used in a steam boiler, bubbling or surging of the boiling water may intermittently activate the cut-off and cause rapid fluctuations in the fuel supply. Since such fluctuations can damage a boiler or disrupt service, certain Hydrolevel models for residential steam boilers incorporated a time-delay element to insure that mere fluctuations in water level would not cut off the fuel supply. App. 161-62; DX BN, pp. HT1268-9.

2. ***ASME's Procedures.*** One of the over 400 codes and standards promulgated and published by ASME is the approximately 18,000 page Boiler and Pressure Vessel Code (the "B-PV Code"), which sets standards of performance for various components of steam and water boilers, pressure vessels, and similar objects. App. 611. The B-PV Code was first promulgated in the early part of the twentieth century when boiler explosions caused by inadequate safety precautions frequently caused death, injury and property damage. App. 928-29. Section IV of the eleven section B-PV Code, which deals specifically with heating boilers, has been adopted in 46 states and all but one Canadian province. PX 30A at Exh. H, pp. 2-3. Since the promulgation and acceptance of the B-PV Code, personal injuries and major property damage caused by boiler explosions have been virtually eliminated. App. 929.

For many years, ASME has regularly provided written or oral interpretations of its codes. App. 646. These interpretations are offered free of charge as a public service. They are available to members and non-members alike. Under the procedures set forth in its bylaws, requests for interpretation are referred to the relevant ASME committee responsible for the code in question. The committee, following its own internal procedures, may respond to properly worded inquiries in writing. ASME regularly receives approximately

20-30,000 such inquiries per year regarding the B-PV Code alone. App. 861.

The Boiler and Pressure Vessel Committee (the "B-PV Committee") is responsible for supervising and interpreting the B-PV Code and, in turn, maintains the Section IV Subcommittee (also called "the Heating Boiler Subcommittee") responsible for that sub-section of the B-PV Code. The Section IV Subcommittee is one of twelve subcommittees, thirty-five subgroups and seven working groups maintained by the B-PV Committee. PX 9B at Appendix IV (AX V. 201-04; App. 564-65).

Under §§ 8.01 and 8.02 of the B-PV Committee's procedures, questions directed to that Committee may be answered by the staff secretary or referred to the appropriate subcommittee chairman. AX V. 183-85, 208-10. In some instances in which responses to similar inquiries are on file, the secretary may simply reply based upon such previous answers. Alternatively, in such instances or when a new question can be answered by direct reference to the B-PV Code, the chairman of the relevant subcommittee may outline the reply to be sent by the secretary as an "unofficial communication." Such drafts also are regularly forwarded to the B-PV Committee Chairman and Vice-Chairman for review and comment. App. 867; AX V. 209. Under ASME's procedures, only an inquiry which could not be answered by direct reference to the Code would be referred to a full Subcommittee for consideration and then reviewed and answered by the B-PV Committee in developing an "official" response. AX V. 184 (§ 8.02(b)), 205, 210.

With respect to devices such as cut-offs, ASME concerns itself solely with standards of performance—that is, abstract principles of acceptable levels of safe operation. Under its procedures, neither ASME nor its committees approve, recommend or endorse proprietary or specific designs. App. 642-45, 656; AX V. 184 (§ 8.01 (c), (d)), 191-92. Letters of inquiry which can only be answered by addressing the acceptability of a particular device or design are not answered

by ASME, but are referred to regulatory organizations for response. AX V. 191-92; App. 732-33.

3. ***The April 29, 1971 Letter.*** In March 1971, James Solon, President of M&M, Eugene Mitchell and John James, Vice-Presidents of M&M, and T.R. Hardin, a Vice-President of Hartford, met over dinner in Chicago to discuss various matters. At that time, James and Hardin were also active as volunteers in ASME activities, Hardin as Chairman and James as Vice-Chairman of the Section IV Subcommittee. Among other matters, those present at the Chicago dinner discussed the possibility of requesting from ASME advice on whether a cut-off could meet ASME standards if it included a time-delay. PX 16a, pp. 787-92, 823-25 (App. 499-500); PX 18A, pp. 382-89 (App. 498-99); PX 14, p. 133 (App. 569-70). James and Hardin thereafter consulted about the wording of the request. PX 16a, pp. 877, *et seq.*

On April 12, 1971, Mitchell of M&M directed a letter, drafted by James, to W. B. Hoyt, staff secretary of the B-PV Committee. J.A. 62 (PX 38; AX V. 1; App. 215-16). The letter inquired whether paragraph HG-605 of B-PV Code Section IV permitted the incorporation of a time-delay feature in a cut-off so that the cut-off would operate only after the boiler water level fell below the required level for automatic, safe cut off. It stated:

> "Par. HG-605 of Section IV states that each automatically fired steam or vapor-system boiler shall have an automatic low-water fuel cut-off so located as to *automatically cut off the fuel supply when the surface of the water falls to the lowest visible part of the water-gauge glass.* Is it the intent of this statement that the cut-off operate immediately when the boiler water level falls to the lowest visible part of the water-gauge glass, or is it permissible to incorporate a time-delay feature in the cut-off so that it will operate *after the boiler water level reaches some point below the visible range of the gauge glass?*"

Id. (emphasis added). In order to assure an adequate supply of water covering the heating element, B-PV Code standards

provide that a glass gauge be placed on heating boilers so that one can visually determine the amount of water in the boiler. PX 30A at Exh. A, ¶ HG-602(b) (AX V. 8-9; App. 666). When the water falls below the visible portion of a properly placed gauge, that event signals a potentially dangerous level of water. Paragraph HG-605(a) requires that a cut-off be so located as automatically to cut off the fuel supply when the surface of the water falls to the lowest visible part of the gauge glass. PX 30A at Exh. A, ¶ HG-605(a) (AX V. 2).

Following standard procedures, the letter was referred by Hoyt, who had no expertise in this particular aspect of heating boilers, to Hardin, as Chairman of the appropriate Subcommittee. App. 863-65, 903-04; AX V. 6. Hardin composed a draft reply, which he sent to Hoyt, as well as to the Chairman and Vice-Chairman of the B-PV Committee. J.A. 63 (PX 18C at Exh. 5; AX V. 7; App. 573).

On April 29, 1971, Hoyt routinely responded to the M&M inquiry by forwarding the "advice" of the Subcommittee Chairman, adopting Hardin's language in an "unofficial" response. J.A. 64 (PX 39; AX V. 10; App. 157-58). In essence, the reply stated "it is the intent of Par. HG-605(a) that the low-water fuel cut-off operate immediately and positively when the boiler water level falls to the lowest visible part of the water gauge glass," and that, without more, a time delay feature which operated after the water had left the gauge glass would provide "no positive assurance that the boiler water level would not fall to a dangerous point during the time delay." Specifically, the letter stated:

> "The inquiry contained in your letter of April 12, 1971 was referred to the Chairman of the concerned Subcommittee who offers the following advice:
>
> > "A low-water fuel cut-off is considered strictly as a safety device and not as some kind of an operating control. Assuming that the water gauge glass is located in accordance with the requirements of Par. HG-602(b), it is the intent of Par. HG-605(a) that the low-water fuel cut-off operate immediately and

positively when the boiler water level falls to the lowest visible part of the water gauge glass.

"There are many and varied designs of heating boilers. If a time delay feature were incorporated in a low-water fuel cut-off, there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period."

This advice, of course, was nothing more than a straightforward interpretation of the B-PV Code itself in response to the limited inquiry posed. Mitchell had asked only if it were permissible to incorporate a time-delay feature which operated *after* water had left the safety gauge glass. The reply simply noted the requirements of the B-PV Code and stated the self-evident conclusion that any construction such as that posited in the inquiry, which permitted operation of a time-delay after water was already below the minimum gauge glass level, would provide no assurance that the water would not fall to a dangerous point during the time-delay. In accordance with ASME procedures, the letter made no mention of any manufacturer or proprietary device.

4. ***Misuse of the April 29, 1971 Letter by M&M.*** Notwithstanding the extremely limited nature of the April 29 letter, officials of M&M proceeded to misuse the letter in promotional efforts, deliberately (and without ASME's knowledge) representing to consumers that it specifically applied to the Hydrolevel proprietary device. In particular, M&M included in a booklet for its sales representatives, called "The Opposition—Who They Are, How to Beat Them," an erroneous statement regarding Hydrolevel's product that "a time delay of any kind in the firing device circuitry would very definitely be against the ASME Code...." PX 18C at Exh. 10 (AX V. 13); *see also* AX V. 11-20; A-8. In addition, M&M officials made similar statements to potential customers to persuade them not to buy the Hydrolevel device. *See, e.g.*, PX 13, pp. 139-43 (App. 568). There was, however, absolutely no evidence that ASME participated in or was even aware of these misleading promotional efforts by

M&M until after Hydrolevel brought the matter to its attention in early 1972.

5. ***Hydrolevel Complains.*** In January 1972, Dominick DeLeonardis, Vice-President of Hydrolevel, apparently learned for the first time that potential customers had been told about ASME's April 29 letter, as misinterpreted by M&M. App. 186-87. On the same date, he wrote to Hoyt of ASME, asking for a copy of the letter. J.A. 65 (PX 40; AX V. 21; App. 215). On February 8, 1972, ASME responded to DeLeonardis quoting in full the substantive provisions of the April 29 letter. J.A. 66-67 (PX 41; AX V. 22; App. 215). In conformity with a strict ASME policy affording anonymity to inquirers, the February 8, 1972 reply did not indicate that the initial inquiry prompting the April 29 letter came from M&M.

Thereafter, on March 23, 1972, Russell Rymer, President of Hydrolevel, directed a lengthy complaint to Mr. Hoyt and all B-PV Committee and Section IV Subcommittee members. J.A. 68-73 (AX V. 29-37).* This letter set forth Hydrolevel's experience with the dissemination of the misinterpretation of the April 29 letter and requested that ASME issue a statement that would "make it very clear that the low water cutoffs having time delay features are indeed acceptable under the Code," and "circulate [such] a correcting statement generally among all who might reasonably have become privy to your letter." J.A. 73.

6. ***The June 9, 1972 Letter.*** Promptly upon receipt of Rymer's letter, ASME placed the matter on the agenda for the next meeting of the Heating Boiler Subcommittee and the B-PV Committee, to be held on May 4 and 5, 1972 in Minneapolis. Hydrolevel was informed of this schedule but, despite the fact that all ASME committee and subcommittee meetings are open to the public without restriction and that even non-members have an opportunity to participate in debate, it did not send a representative. J.A. 76-81 (DX Y-1, Y-2; AX V. 40-45; App. 623-24).

* This exhibit was admitted into evidence between PX 41 and PX 42, at App. 216-17, but apparently was not separately numbered.

On May 4, 1972, the Section IV Subcommittee met with over 60 people in attendance. J.A. 76-77; App. 637-41. Among numerous other matters, Rymer's complaint came before the meeting, at which point James—who was now acting Chairman of the Subcommittee—voluntarily relinquished the chair and did not participate in the discussion. PX 16a, pp. 1074-76, 1094; App. 742-44. The Subcommittee recommended that the intent of the first substantive paragraph of April 29 letter be reaffirmed, that it be emphasized—precisely in accordance with Hydrolevel's request—that time-delays *per se* did not violate the B-PV Code, and that the B-PV Committee consider drafting an appropriate reply. PX 16B at pp. HS 503, 524 (AX V. 58-59; App. 570, 591); J.A. 82-83 (PX 16B at Exh. 28, pp. AS 43-44; AX V. 46-47).

On May 5, 1972, in accordance with ASME procedures, James—as acting Chairman of the Subcommittee—reported to the B-PV Committee the approximately 30 decisions reached the day before by the Subcommittee. Included in that report was the Subcommittee's recommendation on the Rymer complaint. PX 16a, pp. 1092-94; J.A. 82-83. With over 120 people in attendance (J.A. 78-81), the B-PV Committee discussed the matter at length and voted (1) to reaffirm the express requirement of the B-PV Code that any cut-off device must operate to shut down a boiler when water falls to the lowest visible part of the gauge and (2) to emphasize that this requirement does not in itself bar the use of time-delay devices. The Chairman of the B-PV Committee appointed a special task force to draft a response incorporating this position. App. 828-31.

The two task force members then exchanged several drafts of the proposed response (PX 30L, pp. 2-5 (AX V. 48-51; App. 666)), which in substance constituted the eventual June 9, 1972 "official" clarification letter. J.A. 84 (PX 45; AX V. 77; App. 216); *see also* A-23. Thereafter, James unilaterally wrote to the task force suggesting a semantic change in the last paragraph of the proposed response. PX 16B at HS 340 (AX V. 52); PX 16a, pp. 1132-33, 1150-51. While this suggested language was adopted by the task force

chairman* (PX 30L, pp. 6-7 (AX V. 53-54)), it had no significant impact on the unambiguous clarification statement that the task force produced. The letter specifically advised Hydrolevel that "there is no intent in Section IV to prohibit the use of low water fuel cutoffs having time delays. . . ." J.A. 84; *see also* A-23.

Thereafter, the draft was circulated with the minutes of the May 5 meeting to over 300 individuals active in the boiler market, clearly conforming with Rymer's requested circulation of a "correcting statement". J.A. 73; App. 673, 837; *see* p. 10, *supra.* In accordance with ASME procedures, all Committee votes had to be in favor of the minutes before the letter could be sent (AX V. 75-76); no one registered an objection and the June 9 letter was sent to Hydrolevel. App. 858-59. Thereafter, Hydrolevel privately expressed complete satisfaction with ASME's June 9 letter and distributed it to customers and potential customers. App. 294; DX BM-1 (AX V. 78-79; App. 288-89); *see also* A-23.

Although Hydrolevel could have appealed the June 9, 1972 response to ASME's Policy Board on Codes and Standards had it been dissatisfied with either its contents or the procedures leading to its issuance (App. 818-19), it did not do so and, in fact, never communicated directly with ASME following the issuance of the June 1972 letter. Instead, over three years later, finding that it still could not succeed in penetrating the cut-off market against well-established and better funded competitors, Hydrolevel filed this suit on August 19, 1975.

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* The task force was chaired by the Executive Director of the National Board of Boiler and Pressure Vessel Inspectors, the umbrella group for governmental regulatory entities responsible for overseeing the compliance of proprietary devices with applicable codes and standards. He thus was well-versed in the underlying safety requirements and technical issues, and had no possible self-interest. App. 831, 732-33.

C. The Complaint, The Trial, and The Court of Appeals' Opinion

1. ***The Complaint.*** In the form in which it was presented to the jury,* the amended complaint charged that ASME conspired with ITT/M&M and Hartford to restrain trade in violation of Section 1 of the Sherman Act and to monopolize the low-water cut-off market in violation of Section 2. J.A. 19-22. Hydrolevel's apparent theory was that through issuance and misuse of the April 29, 1971 letter, ASME, ITT/M&M and Hartford conspired to eliminate Hydrolevel as a potential market force in the cut-off market.

2. ***The Trial.*** During the presentation of its case, Hydrolevel proceeded on the theory that James and Hardin had devised a "loaded" question to be posed to ASME, and orchestrated an intentionally misleading response by ASME in the form of the April 29, 1971 letter. Hydrolevel's premise was that ASME expressly and intentionally participated in these acts and was thus liable for them. At the close of plaintiff's case, however, the trial judge expressly rejected this theory, ruling that there was insufficient evidence to show that ASME had knowledge of or was liable for the issuance of the April 29 letter:

> "If all you had was the original issue of the letter, and even a conference, I don't think I would let it go to the jury. After all, you can't have an organization like this held responsible where some businessman wants to use or abuse his position, given the best possible posture to the plaintiff's case. So even though M&M wanted to use your client [ASME] as a vehicle for getting some advantage, I don't think that is enough to hold you liable."

J.A. 34-35. Instead, the Court allowed the case to continue solely on a new and hitherto unexpressed theory that ASME

* Counts 2 through 4 of the amended complaint, based on state law charges, were voluntarily withdrawn prior to trial. They had alleged: violation of New York's Donnelly Act, Gen. Bus. L. § 340 (count 2); trade libel (count 3); and tortious interference with business relations (count 4).

might be liable for M&M's activities because it failed to take more effective steps when it first learned of them in 1972:

> ". . . But once having had the matter brought to its attention and having made clear to permanent employees of rather high rank that a possible injustice has been done it might be thought by the trade to indicate disapproval. It does seem to me that it can be argued that the failure at that point to take reasonable steps . . . to clarify the situation to the trade, it could be considered as an implicit joining of a conspiracy already entered into."

J.A. 35.

On January 30, 1979, the jury found that ASME had conspired to restrain trade in the cut-off market.* Several days later, after a separate trial on the question of damages, the jury found that Hydrolevel had suffered damages of $3.3 million. The trial judge reduced those damages by the $800,000 prior settlements to $2.5 million, trebled that, and entered a judgment for $7.5 million. ASME appealed from the liability verdict and damage assessment. Hydrolevel cross-appealed from the trial judge's deduction of settlements before trebling and decision not to grant attorneys' fees.

3. ***The Court of Appeals' Opinion.*** On appeal to the United States Court of Appeals for the Second Circuit, the parties focused on two theories of liability. First, ASME argued that there was no evidence that it intentionally or deliberately participated in a conspiracy to restrain trade or to monopolize; Hydrolevel, on the other hand, contended that ASME's handling of the April 29, 1971 letter showed that it was an active and knowing participant. Second, Hydrolevel

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* Although rejected by the Court of Appeals as grounds for reversal (A-19 to A-21), the jury's verdict may have been influenced by several prejudicial factors. First, the court had allowed to be admitted into evidence, ostensibly for limited purposes, a *Wall Street Journal* article (J.A. 94-98 (PX 5 at p. AS-32 and Exh. 13; AX V. 87; App. 563, 573, 590-91. 1186)), which summarized Hydrolevel's allegations and which concluded by suggesting that the Federal Trade Commission felt that this was a matter for rectification by a court. Second, the summation and rebuttal summation by Hydrolevel's counsel were highly emotional and replete with misstatements of the record. *See* ASME Brief to the Court of Appeals at 37-42.

argued—and ASME disputed—that ASME's reaction to the discovery of the circumstances surrounding the April 29, 1971 letter constituted a *post hoc* "ratification" of the conspiratorial acts. The first theory had been rejected by the trial judge at the close of the plaintiff's case; with respect to that theory, ASME argued that under normal principles of agency law, it could not be held liable for the acts of disloyal volunteer members unless those members intended through their acts to benefit ASME. Regarding the second theory, ASME contended that there was simply no evidence that it had ratified or adopted any conspiratorial acts; rather, the only evidence showed that it had acted affirmatively to set the record straight when the misinterpretation was brought to its attention.

In its opinion, the panel of the Court of Appeals expressly did not reach either theory of liability, although in its damages section, it implicitly rejected Hydrolevel's "ratification" argument by holding that ASME had cured any adverse effect of the April 29, 1971 letter by publishing a full and fair correction of it on June 9, 1972.* Rather, the Court noted: "We need not resolve that dispute [between the two theories], for we hold that the district court erred in refusing Hydrolevel's requested jury instruction that incorporated an apparent authority theory."** A-13.

The panel acknowledged that "the appropriate theory for conventional torts" (A-13) is that a corporation is liable for the acts of its agents only if the agent intended to advance his

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* The panel stated: "The June 1972 letter was a retraction of the April 1971 interpretation . . . As ASME's sole contribution to the conspiracy was the April 1971 letter, a suitable retraction of the misinterpretation in the April 1971 letter was all that was required to free it from further liability for any damages caused by the conspiracy." A-23.

** This holding is curious, in itself, since the jury instruction actually given did not differ in essence from that requested by Hydrolevel. First, the District Court's jury instruction "incorporated an apparent authority theory" in language virtually identical to that requested in Hydrolevel's Requested Charge No. 28. *Compare* J.A. 47 *with* J.A. 59. Second, Hydrolevel's Requested Charge—contrary to the panel's conclusion—included a requirement that an agent's "acts [be] done on behalf of a corporation" in order to be "within the scope of employment." J.A. 59.

employer's interest. It then decided that vicarious liability in federal antitrust cases should not be governed by this general rule, but rather that antitrust defendants are liable for all acts of their agents even when the agents act solely for their own purposes and actively deceive the principal. It concluded:

> "The conduct at issue here, however, is far closer to the torts discussed in [*Restatement (Second) of Agency*] § 247 (defamation); § 248 (interference with business relations); § 257 (misrepresentation); and §§ 261 and 262 (fraud). None of these sections ties the principal's liability to a requirement that the agent act at least in part for the principal's benefit, and several expressly reject such a requirement."

A-13. The Court reasoned that "[a] conspiracy to restrain trade is so similar to fraud, injurious falsehood, and tortious interference with business relations that application of the Restatement rules governing those torts is appropriate." A-15.

Thus, the Court of Appeals held that in federal antitrust cases, the standard for vicarious liability should be the broadest that appears in agency law, and that a principal is liable for all acts of its agents within the scope of their "apparent authority." It further held that the general rule requiring the agent to have intended to benefit the principal was inapplicable to antitrust cases and that vicarious liability under the antitrust laws is governed by an exceptional rule derived from specialized areas of tort liability. The Court thus affirmed ASME's liability for the acts of two of its volunteer members even while tacitly accepting that the organization had no knowledge of those agents' real motives, the agents did not intend to benefit the organization, and the agents actively deceived the organization in order to benefit themselves and their true principals (in this case, their employers):

> "For ASME to be liable . . . Hydrolevel had to demonstrate *only* that ASME's agents acted within their apparent authority when participating in the conspiracy; it did not have to demonstrate that they also acted in part

to benefit ASME or that ASME later ratified their actions."

A-19 (emphasis added).

Indeed, the panel acknowledged that ASME's participation in the antitrust conspiracy was "unintentional" (A-26) and suggested that its decision was based on a theory of negligence. The panel stated that "[w]hile ASME may have no alternative to staffing its committees with business people having practical knowledge, there is a corresponding duty to be aware of and guard against the temptations thus afforded by inherent conflicts of interest. Absent some internal review procedures, no individual should be empowered to rule dispositively on the fitness of a competitors' product." A-16.

SUMMARY OF ARGUMENT

ASME is a non-profit, voluntary membership organization devoted to the promotion of the art and science of mechanical engineering. It conducts a broad array of programs and activities in the public interest, virtually all of which are made possible through the efforts of its volunteer members. In the instant case, two of ASME's more than 100,000 members conceived a scheme whereby, through a clever manipulation and distortion of one of ASME's programs, they were able to help one of their employers, M&M, gain a competitive advantage over another concern, Hydrolevel. It is clear, and the Court of Appeals tacitly accepted, that these two volunteers did not intend to benefit ASME and that, in fact, they acted in secret and disloyally to ASME in carrying out their scheme. They were, however, purportedly acting within the scope of their "apparent authority" in causing the April 29 letter to be issued by ASME, and for that reason—and that reason alone—the Court of Appeals held ASME liable as a participant in an antitrust conspiracy directed against Hydrolevel.

Petitioner submits that the Court of Appeals' decision is wrong as a matter of law. First, the panel's holding is contrary to prior decisions of this Court, which have expressly rejected "apparent authority" as a basis for holding a

voluntary organization liable under the antitrust laws for an agent's acts. In *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U.S. 344 (1922) and *Coronado Coal Co.* v. *United Mine Workers*, 268 U.S. 295 (1925), this Court determined that antitrust liability of a voluntary organization can be based on the acts of its members only if they had actual authority or the organization ratified their acts.

Second, the panel's opinion is contrary to every prior federal antitrust decision that has addressed the issue of agency liability. Without exception, those precedents hold that an agent must have intended to benefit his principal, at least in part, in order to bring his actions within the scope of his employment and render the corporate principal liable. Similarly, under federal regulatory statutes other than the antitrust laws, the federal courts have rejected the holding of the panel and have required a showing that the agent intended to benefit the principal as a prerequisite to finding the principal liable.

Third, the panel misapplied the agency principles of vicarious liability on which it purported to rely. It not only incorrectly summarized certain sections of the *Restatement (Second) of Agency* upon which it based its decision (which in fact support ASME's position and would have required reversal), but ignored the requirement of decisions based on "apparent authority" principles that the plaintiff directly rely on the agent's "apparent authority" from the defendant. Moreover, while this Court and other federal courts have in limited instances found that a corporate principal may be better able to bear the risk of an agent's perfidy and, thus, should make an injured party whole, that approach is inapplicable—and has never been applied—either to an action involving punitive damages or to a non-profit, public interest organization which logically cannot benefit from the agent's acts.

Furthermore, the panel erred in finding liability for "unintentional participation" in an antitrust conspiracy. This extraordinary holding, apparently based on a theory of negligence, is squarely inconsistent not only with the facts, but

with this Court's requirement of intentional, purposeful participation in an antitrust conspiracy. More fundamentally, Hydrolevel never met its burden of showing ASME's intentional participation in the curious conspiracy that it alleged. In the absence of any evidence of, or any conceivable motive for, ASME's active participation in that conspiracy, it follows not only that the judgment of the panel should be reversed, but that the case should be remanded with directions to dismiss the complaint.

Finally, in holding that voluntary associations like ASME may unintentionally participate in antitrust violations by virtue of the acts of disloyal volunteers, the Court of Appeals has adopted a rule that will seriously jeopardize the effectiveness of the entire voluntary sector. This holding subjects nonprofit, voluntary membership organizations to a form of liability against which they cannot protect themselves, short of simply abandoning many of their programs and activities in the public interest. Such a result is not only legally unprecedented, but is contrary to sound public policy.

In sum, the panel's decision is fundamentally flawed and there is simply no supportable basis for holding ASME liable under the circumstances of this case. The judgment of the Second Circuit panel should be reversed and the complaint dismissed.

ARGUMENT

POINT I

AN ORGANIZATION SHOULD NOT BE HELD STRICTLY LIABLE UNDER THE ANTITRUST LAWS BASED SOLELY ON THE ACTS OF DISLOYAL AGENTS WHO DID NOT INTEND TO BENEFIT THE ORGANIZATION

The plaintiff proceeded in the trial court on theories that ASME conspired with ITT/M&M and Hartford to exclude Hydrolevel from the cut-off market by means of a deliberately artificial interpretation of the ASME B-PV Code and that ASME acquiesced in M&M's misuse of that April 29, 1971 letter. Unlike virtually every decision involving a violation of Section 1 of the Sherman Act, this case does not involve an agreement among competitors,* an agreement among manufacturers and distributors,** or the activity of a trade association whose purpose is to foster, protect or regulate the interests of its members.*** Rather, the plaintiff asserted that ASME, a non-profit, public service organization with no corporate members, somehow decided to join with ITT, M&M and Hartford**** to keep Hydrolevel—a fledgling manufacturer against whom ASME had absolutely no adverse economic interest—from attempting to establish itself in the fuel cut-off market.

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* *See, e.g., United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

** *See, e.g., Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968); *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

*** *See, e.g., National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978); *Silver* v. *New York Stock Exchange, Inc.*, 373 U.S. 341 (1963); *Radiant Burners, Inc.* v. *People's Gas, Light & Coke Co.*, 364 U.S. 656 (1961).

**** Hydrolevel argued, and the Court of Appeals appeared to accept (A-5, n. 2), that ITT—which already owned a minority interest in Hartford—was negotiating to buy M&M in April 1971, which would supply a motive (otherwise completely lacking) for Hartford and Hardin to conspire to benefit M&M. In fact, the only evidence at trial was that the earliest "preliminary discussions" of M&M's acquisition by ITT occurred *after* the April 29 letter

The evidence at trial utterly failed to prove any active or intentional participation by ASME in this curious conspiracy, and the Court of Appeals ultimately noted that ASME's participation was "unintentional." A-26. Instead, the panel reasoned that, since James and Hardin conspired to aid M&M in its efforts to disparage Hydrolevel's product and since they acted within the scope of their "apparent authority" from ASME, the organization was strictly liable as a participant in an antitrust conspiracy to restrain trade in violation of Section 1 of the Sherman Act. The panel reached this conclusion even while acknowledging that ASME's putative "agents" never intended to benefit it and acted solely to benefit M&M. Petitioner submits that this holding was incorrect as a matter of law.

A. The Panel's Decision Is Contrary to Prior Decisions of This Court Requiring Actual Authority or Ratification for a Voluntary Organization to Be Held Liable for an Agent's Acts in Violation of the Antitrust Laws.

This Court has expressly ruled that the "apparent authority" of an agent is an insufficient predicate for a principal's liability under the federal antitrust laws. In *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U.S. 344 (1922), a labor union was sued under the Sherman Act for concerted activity having an anticompetitive effect on plaintiff's business. Addressing the question "whether the International Union was shown by any substantial evidence to have initiated, participated in or ratified the interference with plaintiffs' business," *id.* at 393, this Court reversed a verdict in the plaintiff's favor, holding that under agency principles applicable to the antitrust laws, a voluntary organization could not be held liable for the acts of its members absent either actual authority or ratification:

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was written. PX 14 at p. 184 (HX V. 168; App. 569-70). There was thus no evidence of a motive for Hartford or Hardin to participate in the alleged conspiracy. However, since the contrary conclusion pervades the Second Circuit panel's opinion and is not at issue here, it will be assumed *arguendo* for the remainder of this brief that Hartford and Hardin were participants in the conspiracy in restraint of trade.

> "A corporation is responsible for the wrongs committed by its agents in the course of its business, and this principle is enforced against the contention that torts are *ultra vires* of the corporation. But it must be shown that it is in the business of the corporation. Surely no stricter rule can be enforced against an unincorporated organization like this. Here it is not a question of contract or of holding out an appearance of authority on which some third person acts. It is a mere question of actual agency which the constitutions of the two bodies settle conclusively. If the International body had interfered or if it had assumed liability by ratification, different questions would have arisen."

Id. at 395. In *Coronado Coal Co.* v. *United Mine Workers,* 268 U.S. 295 (1925), the case again came before this Court after retrial, during which the plaintiff had introduced further evidence showing that the president of the union had directly encouraged the acts complained of. This Court held that while such evidence might have sufficed to impose personal responsibility on the labor officials involved, it was insufficient to impose liability on the union. The Court held that "it must be clearly shown in order to impose such a liability on an association of 450,000 men that what was done was done by their agents in accordance with their fundamental agreement of association." *Id.* at 304.

In the instant case, the panel dealt with the *Coronado Coal* decisions first by misstating their applicability to ASME's argument, and then by proposing artificial grounds for distinguishing them. Instead of discussing *Coronado Coal* in terms of agency liability, the panel phrased ASME's argument as being that "ASME's unique structure or status should mandate a different result" regarding liability. A-18. In fact, while *Coronado Coal* implied that in an antitrust case a voluntary association should be protected by at least as strict a test as that governing business organizations, it squarely held that, in any event, actual authority or ratification, rather than apparent authority, was necessary.

The panel then reasoned that *Coronado Coal* merely "held that an international union may not be held liable for a Sherman Act violation by leaders of a local where, under the constitution of the International, it could only accept authority for the action by express ratification. [268 U.S.] at 304." A-18. This limitation of *Coronado Coal* to instances where an organization "accepts" authority for its members' action is illogical and rejected by precedent. While an entity's internal organization and constitution undoubtedly have bearing on its liability for the acts of its members, allowing an organization to "accept" or decline liability as a matter of choice is hardly sound policy and exalts form over substance, and the only court to address this claimed distinction has so held. In *Truck Drivers Local No. 421* v. *United States*, 128 F.2d 227 (8th Cir. 1942), the Court of Appeals for the Eighth Circuit reversed a verdict in an antitrust prosecution on the ground that a voluntary organization was not liable for the acts of its members absent actual authority:

> "To bind the union in a situation such as this, actual and authorized agency was necessary; mere apparent agency would not be sufficient to take the matter to the jury, unless the circumstances were so strong as competently to support an inference of actual authority."

Id. at 235. In particular, the Eighth Circuit rejected an argument based on the distinction found dispositive by the panel in this case, namely, that *Coronado Coal* protected only an international with limited constitutional powers but did not apply to a union local, noting that "the difference fundamentally is primarily one of degree." *Id.* at 236.

In short, *Coronado Coal* squarely stands for the proposition that antitrust liability of a voluntary organization can be based on the acts of its members only if the members have actual authority to commit those acts or if the organization ratifies them. In veering so sharply from this precedent, the Court of Appeals committed error that should be reversed by this Court.

B. The Court Below Deviated From Established Precedent That Requires an Intent to Benefit an Organization for It to Be Liable for an Agent's Acts.

Every federal antitrust decision that has addressed the issue of agency liability has held that, absent ratification by the corporate principal, an agent must have intended at least in part to benefit his principal in order for the actions to be within the scope of the agent's employment and to hold the principal liable. In addition, the federal courts have rejected an "apparent authority" standard, without an intent to benefit requirement, as inapplicable to determinations of liability under federal regulatory statutes other than the antitrust laws.

As discussed, in *Truck Drivers' Local No. 421* v. *United States, supra,* 128 F.2d 227, the Eighth Circuit held that in an antitrust case "mere apparent agency would not be sufficient to take the matter to the jury," *id.* at 235, holding, under *Coronado Coal,* that actual authority or ratification was necessary.

The Ninth Circuit, in a criminal antitrust case brought under Section 1 of the Sherman Act, has also addressed the circumstances under which a corporation is liable for its agent's acts. In *United States* v. *Hilton Hotels Corp.,* 467 F.2d 1000 (9th Cir. 1972), *cert. denied sub nom. Western International Hotels Co.* v. *United States,* 409 U.S. 1125 (1973), the court held that a corporation may be liable even if it did not actually receive the benefit of the agent's acts. The Ninth Circuit squarely held, however, that the corporation would not be liable if the agent intended to benefit only himself or another, since "[a] purpose to benefit the corporation is necessary to bring the agent's acts within the scope of his employment." *Id.* at 1006, n. 4.

Similarly, *in United States* v. *American Radiator & Standard Sanitary Corp.,* 433 F.2d 174 (3rd Cir. 1970), *cert. denied,* 401 U.S. 948 (1971), the Third Circuit upheld corporate liability under the federal antitrust laws for the acts of an employee on the ground that the agent was "motivated at least in part by a desire to serve" the principal. *Id.* at 204;

see also United States v. *Cadillac Overall Supply Co.*, 568 F.2d 1078, 1090 (5th Cir.), *cert. denied*, 437 U.S. 903 (1978) ("the actions of the [defendant's] agents were taken for the purpose of benefiting the corporation").*

As the panel in this case acknowledged, the principle inherent in these cases—that an organization may be liable for the acts of its agents only if the agents intend thereby to benefit the corporation—is the general agency rule for tort liability. A-13. The *Restatement (Second) of Agency* provides generally that "[a]n act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed." *Id.*, section 235. Similarly, under the *Restatement* a principal is not deemed to have knowledge of events based solely upon the knowledge of an agent if "the agent secretly is acting adversely to the principal and entirely for his own or another's purposes. . . ." *Id.*, section 282(1).

These settled principles of agency liability have been repeatedly emphasized in many contexts in addition to antitrust cases, including suits under other federal regulatory statutes. The many federal courts adopting these agency principles have uniformly rejected the panel's notion of "apparent authority" as a basis for liability and have required that the agent intend to benefit the principal, at least in part. For example, in *Schoenbaum* v. *Firstbrook*, 405 F.2d 200 (2d Cir. 1968), *cert. denied sub nom. Manley* v. *Schoenbaum*, 395 U.S. 906 (1969), where the plaintiff brought a fraud action under the federal securities acts, the Court noted:

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* Likewise, in *Arthur* v. *Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824 (D. Md. 1937), the Court dismissed a federal antitrust complaint on the ground that the complaint did not demonstrate liability of a corporation for the acts of its employees absent their intent to benefit the corporation:

> "If they [the defendant's agents] had improper personal motives and combined to carry them out through the medium of the defendant corporation to the prejudice of the plaintiff, it is conceivable that a common law tort suit might lie against them; but it is difficult to see how that would constitute either restraint of trade or monopoly of trade on the part of the defendant corporation."

Id. at 830.

> "[A]s in other situations governed by agency principles, knowlege of the corporation's officers and agents is not imputed to it when there is a conflict between the interests of the officers and agents and the interests of the corporate principal."

Id. at 211.

Similarly, in *Standard Oil Co. of Texas* v. *United States*, 307 F.2d 120 (5th Cir. 1962), a prosecution under the federal Hot Oil Act, the Fifth Circuit rejected a finding of corporate liability based on an agent's acts since:

> "[T]he purpose to benefit the corporation is decisive in terms of equating the agent's action with that of the corporation. For it is an elementary principle of agency that 'an act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed.' Restatement of the Law of Agency (2d) § 235."

Id. at 128 (footnote omitted).*

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* *See, e.g., United States* v. *Beusch*, 596 F.2d 871, 877 (9th Cir. 1979) (misdemeanor prosecution under the Bank Secrecy Act; "The acts of an agent may be imputed to the principal . . . but only if it is the agent's purpose to benefit the principal, thus bringing his acts within the scope of his employment."); *Moscarelli* v. *Stamm*, 288 F. Supp. 453, 461 (E.D.N.Y. 1968) (securities case; "It is axiomatic that conduct of an employee not for the purpose of serving the master is not within the scope of his employment (Restatement (Second), Agency, § 235 (1958). . . ."); *Slade* v. *Shearson, Hammill & Co., Inc.*, 79 F.R.D. 309, 313 (S.D.N.Y. 1978) (fraud suit under Securities Exchange Act of 1934; corporation may raise defense "that as a principal it cannot be held chargeable with acts of its faithless employees who committed fraud on the bank in direct conflict with the bank's interest. *See* Restatement (Second) of Agency § 282"); *see also Oman* v. *United States*, 179 F.2d 738, 741 (10th Cir. 1949) (suit under Federal Torts Claims Act); *Steere Tank Lines, Inc.* v. *United States*, 330 F.2d 719, 722-23 (5th Cir. 1963) (violation of Interstate Commerce Commission Regulations); *Ruidoso Racing Ass'n., Inc.* v. *Commissioner*, 476 F.2d 502, 506 (10th Cir. 1973) (civil tax suit); *In Re Investors Funding Corp. of New York*, ___ F. Supp. ___, Fed. Sec. L. Rep. (CCH) ¶ 97,696, at p. 98,654 (S.D.N.Y. 1980) (suit under Securities Exchange Act of 1934).

These principles of agency liability, utilized by the federal courts in both antitrust cases and other actions under the federal regulatory statutes, clearly require reversal of both the panel's decision and jury's verdict. As the appellate panel tacitly accepted, there was no evidence, or even a logical basis for inference, that James or Hardin intended, or could have intended, to benefit ASME by their illicit acts. Rather, both the proof at trial and common sense demonstrate that James and Hardin intended, and could only have intended, to benefit M&M. Accordingly, as a matter of law, ASME should not be held liable for these individuals' acts.

C. The Panel's Decision Erroneously Applies Agency Principles of Vicarious Liability.

In declining to follow the general rule of agency liability, the panel reasoned that:

> "The conduct at issue here, however, is far closer to the torts discussed in [*Restatement (Second) of Agency*] § 247 (defamation); § 248 (interference with business relations); § 257 (misrepresentation); and §§ 261 and 262 (fraud). None of these sections ties the principal's liability to a requirement that the agent act at least in part for the principal's benefit, and several expressly reject such a requirement."

A-13. These *Restatement* sections are not only inappropriate to an antitrust case, but are incorrectly summarized by the panel. Comment c to Section 247 (defamation), upon which the panel relied, states that the principal is liable for the acts of an agent "provided that he acts at least in part to serve his employer's purposes." *See Hooper-Holmes Bureau, Inc.* v. *Bunn,* 161 F.2d 102, 104 (5th Cir. 1947) (defamation case; "The defamatory statements made by a servant only for his own purposes, although made during a transaction in which the servant is acting for the corporation, does not subject the corporation to liability"). Similarly, Comment a to Section 248 (interference with business relations) states that an agent's act binds the principal only "if intended for the benefit of the principal or master. . . ." These sections specifically

support ASME's position, and would require reversal of the panel's opinion. Moreover, as noted above (pp. 24-27, *supra*), these exceptional tort principles of vicarious liablity have never been applied in any federal antitrust case, and are implicitly rejected by every federal court that has addressed the issue.

Equally important, the panel misapplied the rationale for allowing liability upon a showing of apparent authority in the very limited category of cases where that principle is followed. The decisions not requiring the agent's intent to benefit the principal, and those few sections of the *Restatement* that adopt this principle, are based upon the concept of reliance: In a limited set of circumstances, a plaintiff should be entitled to rely on an agent's apparent authority, and for this reason the principal is liable for the agent's acts, *to a plaintiff who so relies,* irrespective of the agent's motive. The theory of apparent authority, as set forth in the *Restatement (Second) of Agency* at section 8, is that when the agent's authority has been directly communicated by the principal to a third party, the principal is bound by his communication from denying authority as to that third party.

This was emphasized by the Seventh Circuit in *Sennott* v. *Rodman & Renshaw,* 474 F.2d 32 (7th Cir.), *cert. denied,* 414 U.S. 926 (1973), a suit under the federal securities acts. There, after a brokerage house had been found liable for the acts of one of its agents, the Seventh Circuit reversed because the trial court had erroneously proceeded on a theory of apparent authority in the absence of any showing of reliance:

> "Under Sennott's theory of apparent authority or estoppel, therefore, plaintiff would be required to prove that he was relying upon [the agent's] apparent authority, and hence on [defendant] Rodman, when he decided to purchase the Skyline options. Reliance is not evident from the record before us."

Id. at 38; *see also Asphalt Industries, Inc.* v. *Commissioner,* 384 F.2d 229, 234 (3rd Cir. 1967) (tax fraud suit; judgment reversed because "there is no innocent third party who dealt

with the corporation in reliance upon [the agent's] authority. . . ."). Liability based upon apparent authority, in which intent to benefit the principal was not shown, has been upheld only in cases where reliance by the plaintiff on the agent's apparent authority was demonstrated. *See, e.g., Community Bank, Lake Oswego* v. *Bank of Hallandale and Trust Co.*, 482 F.2d 1124, 1126-27 (5th Cir. 1973) (common law fraud case; plaintiff relied upon apparent authority of bank officer). In such cases, a crucial element has been that plaintiff himself relied upon the manifestation of authority given by the defendant.

The element of reliance clearly has no application to the antitrust laws generally and is not present in the instant case in any event. First, it is logically anomalous to apply a theory of apparent authority (and its attendant additional element of direct reliance) to laws governing restraint of trade or monopolization, which are designed to protect the marketplace as a whole rather than the individual rights of a specific business. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) ("[t]he antitrust laws, however, were enacted for the protection of *competition*, not *competitors*" citing *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962)) (emphasis in original).

Second, Hydrolevel never even saw the April 29, 1971 letter until after the putative damage was done and obviously did not "rely" on the apparent authority of Hardin. As one commentator has noted, apparent authority as a basis for liability is available "only to those by whom the misleading manifestations [of authority] are received." Seavey, *Agency* § 8, p. 14 (1964).* Conversely, even if one were to assume

* The panel noted that the "difference from the usual situation in which the injured party relies directly on the culpable misrepresentations can hardly be material." A-14. Its sole support for this curious statement was *Ricketts* v. *Pennsylvania Ry. Co.*, 153 F.2d 757 (2d Cir. 1946). The issue in *Ricketts* was whether a tort plaintiff was estopped by a release his lawyer had fraudulently induced him to sign. The Court held that he was not, but "assumed" that if the plaintiff had given the attorney actual authority to settle the claims he would have been so bound. *Id.* at 759. Needless to say, this dictum has no bearing on the issues in this case and has never been applied in any antitrust decision.

that prospective purchasers of Hydrolevel's device did rely on the apparent authority of Hardin to cause the issuance of the April 29 letter, those putative victims were not parties to this suit. Finally, potential customers relied upon M&M's misapplication and distortion of the letter as part of its deliberate campaign (in which ASME took no part) to disparage Hydrolevel's proprietary device. Any reliance, even by non-parties to this action, was thus once removed from ASME; as to Hydrolevel, putative reliance was twice removed. Accordingly, even were the principle of reliance to be deemed applicable to antitrust actions, contrary to all prior precedent, it would nonetheless be inappropriate in this case.

Rather than following this Court's decisions in *Coronado Coal, supra,* the panel purported to follow *Gleason* v. *Seaboard Air Line Railway Co.,* 278 U.S. 349 (1929), in holding an organization liable for unauthorized, disloyal acts of employees. A-13 to A-14. The panel's application of that decision in the context of the antitrust laws and under the facts of this case is mistaken. *Gleason* involved a suit for liability on a bill of lading, and involved interpretation of the federal Bill of Lading Act. *Id.* at 355, 357-58. The reasoning in *Gleason* implicitly encompassed the concept of reliance on "apparent authority" by innocent third parties. *Id.* at 357 ("injury to him who deals with the agent. . . ."). And, while the panel noted that *Gleason* has "not been questioned" (A-14), it is more relevant that it has never been followed in any antitrust case and, indeed, has rarely been followed at all.*

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* *Gleason* has primarily been followed in state court common law fraud proceedings, often involving bills of lading. *See, e.g., Lucas* v. *Ligett & Myers Tobacco Co.,* 50 Hawaii 477, 481, 442 P.2d 460, 463 (1968); *Gartin's Grocery* v. *Lucas County Co-operative Creamery Ass'n.,*231 Iowa 204, 207, 1 N.W. 2d 275, 278 (1941); *Shrier* v. *Morrison,* 357 P.2d 196, 201 (Sup. Ct. Okla. 1960); *Ripon Knitting Works* v. *Railway Express Agency,* 207 Wis. 452, 454, 240 N.W. 840, 842 (1932). The federal courts have infrequently cited to *Gleason* since its decision in 1929, much less followed it.

Furthermore, several federal decisions which have discussed *Gleason* have—contrary to the panel's conclusion—at least implicitly "questioned" it, by requiring that a misbehaving agent be acting with an intent to benefit his principal in order for the principal to be held liable. *See, e.g., Oman* v. *United*

The principle enunciated in *Gleason*, and perhaps the ultimate rationale underlying it, is that in certain limited circumstances the principal is better able to prepare against and bear the risk of loss.* For example, in *United States* v. *Ridglea State Bank*, 357 F.2d 495, 499 (5th Cir. 1966)—upon which the panel in the instant case purported to rely (A-16 to A-17)—the Court noted the following:

> "In a civil action to recover actual damages for an agent's misrepresentation done without intent to benefit his employer, liability is imposed upon the employer not only because the third party reasonably thought that the agent was acting for the employer, see *McCord* v. *Western Union Telegraph Co.*, 39 Minn. 181, 39 N.W. 315 (1888), and perhaps because the imposition of liability will encourage more careful supervision of employees by employers, see Morris, The Torts of an Independent Contractor, 29 Ill. L. Rev. 339, 341 (1934), but also because the third person has suffered loss which the employer is better able to bear and to spread than is his agent, see *Gleason* v. *Seaboard Air Line R'y, supra.* This last reason has been called 'the real reason for employer's liability.' Baty, Vicarious Liability 154 (1916)."

Id. at 499.

States, supra, 179 F.2d at 741 (10th Cir. 1949) (suit under federal Torts Claims Act; "principal is not liable to third persons for torts committed by his agent acting outside his employment. If the agent goes outside his employment and acts not in furtherance of the principal's business, but to effect some purpose of his own, the principal is not liable."); *Ruidoso Racing Ass'n., Inc.* v. *Commissioner, supra,* 476 F.2d at 506 (10th Cir. 1973) (civil tax suit; "The pertinent questions are . . . whether the agent was acting in behalf of and not against the corporation with the result that the corporation benefited from his fraudulent acts.").

* As one commentator noted, its holding is "perhaps best explained" on the ground that the principal's involvement "in commerce makes it fair to impose liability on the carrier." Seavey, *Agency* § 92, p. 164-65, n. 57 (1964); *cf., Elgie & Co.* v. *S.S. "S.A. Nederburg,"* 74 Civ. 5112 (GLG), Slip op. (S.D.N.Y. Aug. 30, 1978).

Petitioner submits that the panel erred in applying this "risk of loss" analysis in the context of the antitrust laws and under the facts of this case. Neither *Gleason* nor *United States* v. *Ridglea State Bank, supra,* have ever been applied in a case involving anything other than recovery of actual damages. Indeed, in *Ridglea State Bank* itself, the Fifth Circuit acknowledged a distinction between civil actions to recover actual damages and suits for punitive or deterrent damages. The Court held that since civil suits under the federal False Claims Act provided for double damages, a stricter test of vicarious liability should be applied, and it reversed a judgment in favor of the Government for failure to show the intent of defendant's agents to benefit their employer. *Id.* at 498-500.

Subsequently, the Court of Appeals for the Fifth Circuit clarified the agency test that it had enunciated in *Ridglea State Bank,* discussing its application to punitive damages suits, such as antitrust actions, in the following terms:

> "The distinction we make here is a well established one—drawn between suits which seek to impute an agent's fraud or guilty intentions to his principal, and suits which seek to allocate the loss resulting from an agent's fraud between the principal and innocent third parties. Two considerations operate to create the distinction. The first is whether the action seeks to impute any evil intent to the principal in a way that would result in punitive consequences to the principal. When the action would have such consequences, then clearly, if the actions of the agent were unauthorized, committed without the principal's knowledge and for no benefit to the principal, the principal should not be held responsible. The types of cases in which we find this rule applied are usually criminal cases, *or cases having some punitive consequences.* See *United States* v. *Ridglea State Bank,* 5th Cir. 1966, 357 F.2d 495, 498-499."

Bankers Life Insurance Co. of Nebraska v. *Scurlock Oil Co.,* 447 F.2d 997, 1004-05, n. 12 (5th Cir. 1971) (emphasis

added).* Thus, in holding that a voluntary association is liable for the undisclosed and disloyal acts of a volunteer member, the panel chose the broadest possible test for vicarious liability found in the law of torts and—against all precedent—erroneously transplanted it to punitive treble damage actions.

Moreover, the panel's reliance on a "risk of loss" analysis misallocates the burden for compensating a third party harmed by an ill-intentioned agent's acts. Under the reasoning of the cases discussed above, the rationale for transferring the "risk of loss" to a principal is that "the third person has suffered loss which the employer is better able to bear and spread than is his agent . . . ." *Ridglea State, supra,* 357 F.2d at 499. In *United States* v. *Hilton Hotels, supra,* the Court observed with respect to Sherman Act violations, which are "motivated by a desire to enhance profits," that a corporation may bear the risk of loss caused to third parties by its agents because it stands to profit by the agents' activity:

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* Although the panel reasoned that an antitrust violation is akin to a mere "variety of business tort . . . remedied through restitution," that the "trebling of damages under the antitrust laws reflects congressional recognition of the difficulty of proving antitrust damages," and that there is "no reason why the treble damage provision of the Clayton Act should compel a restricted view of agency law" (A-17 to A-18), every Court addressing the issue has concluded to the contrary that antitrust damage suits constitute a punitive measure. *See, e.g., Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, ___ *U.S.*___, 49 U.S.L.W. 4537, 4640 (May 26, 1981) ("The very idea of treble damages reveals an intent to punish . . . ."); *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 751 (1947) ("retribution"); *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972) ("treble the damages actually suffered"); *Lyons* v. *Westinghouse Electric Corp.*, 222 F.2d 184, 189 (2d Cir.) (L. Hand, J.), *cert. denied*, 350 U.S. 825 (1955) ("two-thirds of the recovery is not remedial and inevitably presupposes a punitive purpose"); *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F.2d 877, 883 (7th Cir. 1945), *rev'd on other grounds*, 327 U.S. 251 (1946) (treble damage provisions a "penalty"); *Hansen Packing Co.* v. *Armour & Co.*, 16 F. Supp. 784, 788 (S.D.N.Y. 1936) ("symbol of punishment"); *see also* 2 Areeda & Turner, *Antitrust Law* 34 (1978) ("treble damages are indisputably punishment. Accordingly, they should not be awarded in the absence of factors similar to those justifying criminal sanctions").

> "[V]iolations of the Sherman Act are a likely consequence of the pressure to maximize profits that is commonly imposed by corporate owners upon managing agents and, in turn, upon lesser employees .... And if a violation of the Sherman Act occurs, the corporation, and not the individual agents, will have realized profits from the illegal activity."

467 F.2d at 1006; *see also American Radiator, supra,* 433 F.2d at 205; *Bankers Life Insurance Co. of Nebraska, supra,* 447 F.2d at 1004-05, n. 12.

Application of such an analysis to the present case emphasizes the absurdity of the panel's decision. Both as a matter of proof and of simple logic, a non-profit voluntary professional association like ASME did not and could not under any circumstances benefit, or "profit," from the disloyal acts of James and Hardin. Only the commercial entities that were the true principals of James and Hardin could conceivably have benefited from their acts. Indeed, in the instant action, James and Hardin actually were acting as agents of the true beneficiaries of their misdeeds, M&M/ITT and Hartford, rather than as agents of ASME, which was merely an unwitting vehicle in M&M's anticompetitive scheme.

Under these circumstances, neither precedent nor policy suggest any reason why ASME should bear the "risk of loss" for the disloyal volunteers' acts. Simply because Hydrolevel chose to settle with ITT (M&M) and Hartford prior to trial does not diminish the windfall nature of any further recovery against ASME. Rather, M&M/ITT and Hartford, the real instigators and only benefactors of the restraint of trade, not only stand in the best position to bear any loss that might have been suffered, but should be the only entities liable for their agents' acts. Under legal principles as old as the adage that "no man can serve two masters," 6 Matthew 24, and emphasized in every decision that has addressed the issue, it necessarily follows that ASME should not be held liable for

the conspiratorial acts of ill-intentioned volunteers intended to benefit their employers.*

In summary, the theory of vicarious liability based upon "apparent authority" adopted by the Second Circuit in this case has been rejected not only in every antitrust case reaching the issue but in federal court decisions interpreting other federal regulatory statutes as well. More fundamentally, the appellate panel upheld liability on the basis of an exceptional and draconian standard that has no logical or practical application to the antitrust laws or to the facts of this case. This Court should reverse this holding.

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* Indeed, following the conclusion of the trial, the District Court judge noted: "If they [the jury] could have had ITT [M&M] as a party, I think lightning would have gone to ITT. Unfortunately, they didn't have them. They only had [ASME]." Transcript of Feb. 26, 1979 hearing, at 6 (*see* AX V. 221).

POINT II

THE COURT OF APPEALS ERRED IN UPHOLDING ANTITRUST LIABILITY ON THE BASIS OF NEGLIGENT "UNINTENTIONAL PARTICIPATION" IN AN ANTITRUST CONSPIRACY

The panel's opinion is also inconsistent with this Court's decisions requiring intentional, purposeful participation in an antitrust conspiracy. This Court's decisions in *Coronado Coal, supra,* not only provide the standard for holding a principal liable for the acts of its agents, but also establish a rational basis for imputing to the principal the conspiratorial knowledge and intent that this Court has repeatedly recognized as an essential element of an antitrust conspiracy. The panel's "apparent authority" theory provides no such basis; indeed, the panel candidly conceded as much, finding ASME liable for "unintentional participation" in the conspiracy. A-26. The panel did not find that ASME knew of any illicit acts or intended to participate in them; rather, it apparently based ASME's liability on a theory of negligence, holding that since ASME failed adequately to supervise the acts of its volunteer members, it was strictly liable for their anticompetitive conduct.

The key to the panel's decision, that ASME's failure to detect and deter James' and Hardin's conduct violated the antitrust laws, is the following passage in the opinion:

> "While ASME may have no alternative to staffing its committees with business people having practical knowledge, there is a corresponding duty to be aware of and guard against the temptations thus afforded by inherent conflicts of interest. Absent some internal review procedures, no individual should be empowered to rule dispositively on the fitness of a competitor's product. When an organization has placed a person in a position to do what Hardin did, without any check or supervision, it must bear the consequences."

A-16; *see also* A-6 to A-7. This statement is not only factually incorrect, but it clearly reflects a negligence standard for allocating the risk of damages to ASME regardless of its intent or knowledge.*

This Court has held on numerous occasions, however, that an antitrust conspiracy, whether under Section 1 or Section 2 of the Sherman Act, requires an intentional, purposeful agreement:

> "Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified."

American Tobacco Co. v. *United States*, 328 U.S. 781, 810 (1946); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons., Inc., supra*, 340 U.S. at 213 (requirement that conspirators have "a unity of purpose or a common design and understanding"); *see also United States* v. *General Motors Corp.*, 384 U.S. 127, 143 (1966) ("joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan"). These decisions reflect the inherent nature of a conspiracy: one cannot be held liable for the acts of others unless one intends to act jointly with them and has knowledge of at least some of the illicit purposes of the joint venture. *See*

* The statement may also reflect the panel's belief that imposing liability on ASME would encourage more careful supervision by ASME of its volunteer members. However, this view also lacks factual support. As noted above, the panel appeared to believe that Hardin issued the April 29 letter acting entirely alone and "without any check or supervision." A-16. In fact, however, Hardin's draft of the April 29 letter was sent to both the Chairman and the Vice-Chairman of the B-PV Committee for review before release by the Secretary of the Committee. AX V. 6; J.A. 63. The letter passed review by those individuals—and undoubtedly would have escaped detection under any system—precisely because no one unaware of the drafter's ulterior purpose could possibly have detected the letter's hidden significance. M&M's request was limited to advice concerning a cut-off that operated *after* water had left the gauge level required for safe operation. Therefore, the April 29 letter was an accurate response to the question presented; its misleading potential could be discerned only by one who knew of M&M's conspiratorial purposes. *See* pp. 7-10, *supra*.

generally, United States v. *United States Gypsum Co.*, 438 U.S. 422, 443 n.20 (1978).

This Court has never allowed a finding of antitrust liability to be based upon a negligence theory, as the panel apparently did in this case. Indeed, liability on the basis of negligence is squarely inconsistent with a requirement of intentional, knowing participation in a conspiracy. Thus, the panel's decision to allow liability for activity of which ASME had no knowledge not only conflicts with this Court's holdings in *Coronado Coal* and the other precedents cited, but undermines the requirement of intentional participation in an antitrust conspiracy. Viewed against this legal background, it is overwhelmingly clear that whatever the conspiratorial designs of M&M, James, or Hardin, ASME never belonged in this case.

Throughout this action, Hydrolevel has filed briefs and memoranda of law that purported to demonstrate its theory of the case. Almost without exception, every case cited in these papers—and indeed, virtually all decisions upholding an antitrust conspiracy—involved illegal arrangements among business partners or competitors, each of whom stood to benefit from the exclusion of or limitations placed upon a competitor, or of a true trade association which (unlike ASME) is composed of business concerns with a common economic interest. The classic examples of such improper arrangements are horizontal price fixing, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), vertical price fixing, *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911), territorial allocation of markets, *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596 (1972); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951); *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211 (1899), and group boycotts, *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966); *Radiant Burners, Inc.* v. *People's Gas, Light & Coke Co.*, 364 U.S. 656 (1961); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U.S. 457 (1941). None of these decisions even remotely applies to this case. Unlike the defendants in all the cited cases, ASME had no economic

relationship with any of its alleged co-conspirators, and it had absolutely no prospect of economic gain from a successful exclusion of Hydrolevel as a competitor.

In a conspiracy case, whether under Section 1 or Section 2 of the Sherman Act, the plaintiff bears the burden of showing that the defendant deliberately and intentionally participated in an agreement to restrain trade or to monopolize. In the absence of such a showing, the courts have routinely dismissed complaints for failure of proof or reversed verdicts for insufficiency thereof.* Furthermore, given ASME's absolute lack of any financial motive to participate in M&M's conspiracy, the jury could not properly have inferred participation by ASME.

It is true, of course, that the "the determination of whether a conspiracy existed almost inevitably rests on the inferences that may fairly be drawn from the behavior of the alleged conspirators," *Michelman* v. *Clark-Schwebel Fiber Glass Corp., supra,* 534 F.2d at 1043, and that the plaintiff need not show a written agreement or an explicit oral understanding. *American Tobacco Co.* v. *United States, supra,* 328 U.S. at 809. However, this Court has expressly noted that while a court may draw inferences of complicity from concerted behavior of parties having a motive to conspire in

* *See, e.g., Michelman* v. *Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1042-43 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976); *American Telephone and Telegraph Co.* v. *Delta Communications Corp.*, 408 F. Supp. 1075, 1087-88 (S.D. Miss. 1976), *aff'd*, 579 F.2d 972 (5th Cir. 1978), *cert. denied sub nom. Delta Communications Corp.* v. *National Broadcasting Co.*, 444 U.S. 926 (1979); *Hanson* v. *Shell Oil Co.*, 541 F.2d 1352, 1358 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *National Auto Brokers* v. *General Motors Corp.*, 572 F.2d 953, 959-60 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *International Railways of Central America* v. *United Brands Co.*, 532 F.2d 231, 239 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976); *Modern Home Institute, Inc.* v. *Hartford Accident and Indemnity Co.*, 513 F.2d 102, 112-14 (2d Cir. 1975); *DuPont Glore Forgan Inc.* v. *American Telephone and Telegraph Co.*, 437 F. Supp. 1104, 1111-1113 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1367 (2d Cir.), *cert. denied*, 439 U.S. 970 (1978); *Miller* v. *Schweickart*, 413 F. Supp. 1062, 1065 (S.D.N.Y. 1976) (Weinfeld, J.); *United States* v. *Standard Oil Company*, 316 F.2d 884, 890 (7th Cir. 1963).

restraint of trade, such inferences may not be drawn when the parties lack the economic incentive to conspire. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 288 (1968); *see also International Railways of Central America* v. *United Brands, supra,* 532 F.2d at 239-242; *Michelman* v. *Clark-Schwebel Fiber Glass Corp., supra,* 534 F.2d at 1042.

In *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), this Court held that when CBS cancelled an affiliation agreement with a UHF station in the Milwaukee area, which led to a monopoly of the UHF market by CBS, the cancellation alone allowed an inference that CBS harbored a conspiratorial motive. In contrast, in *First National Bank of Arizona* v. *Cities Service Co., supra,* the Court distinguished *Poller* on the ground that in *Poller* the parties had a motive to reach an illegal agreement. Noting that "in this case, as [plaintiff] has admitted right along, the business relationship between him, Cities, and the other defendants was such that it is much more plausible to believe that Cities' interest coincided rather than conflicted, with those of petitioner," the Court ruled that the "inferences of motive that can reasonably be drawn from the facts" did not support a claim of conspiracy. *Id.*, 391 U.S. at 285, 287.*

Rather than revealing any intent to restrain trade, ASME's activities were clearly designed to fulfill the Society's laudable objectives. Even with respect to groups which, unlike ASME, are composed of members having a common economic interest—such as classic trade associations—this Court and other federal courts have consistently ruled that the activities of such a group will be allowed

* The Court's further observation that the plaintiff "is unable to point to any benefits to be obtained by Cities from refusing to deal with him and, therefore, the inference of conspiracy sought to be drawn from Cities" 'parallel refusal to deal' does not logically follow," *id.* at 287 (footnote omitted), precisely characterizes the present case. *See also Loom Crafters, Inc.* v. *New Central Jute Mills Co. Ltd.*, 1971 Trade Cases (CCH) ¶ 73,734 at p. 91,071 (S.D.N.Y. 1971) (Lasker, J). ("It is true that proof of motive is not required to establish a case of conspiratorial conduct [citations omitted], but where the case rests solely on inferences based on circumstantial evidence the failure to offer a credible theory of motivation weighs heavily against the plaintiff.").

considerable latitude unless they reflect an intent to restrain trade. Beginning with *Maple Flooring Manufacturers Association* v. *United States,* 268 U.S. 563 (1925), this Court and the lower federal courts have ruled that a Sherman Act violation could not be inferred, even from the activities of a trade association, unless

> "the court either can infer from this course of conduct a specific and continuing purpose or agreement or understanding on their part to do acts tending to effect an actual restraint of commerce [citation omitted], or unless, on the other hand, it is established that the combination entered into by the defendants in the organization of the defendant association, and its activities as now carried on, must necessarily result in such restraint."

Id. at 577.* *See, e.g., Hatley* v. *American Quarter Horse Association,* 552 F.2d 646 (5th Cir. 1977); *E.A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Committee,* 467 F.2d 178 (5th Cir. 1972), *cert. denied,* 409 U.S. 1109 (1973); *Structural Laminates, Inc.* v. *Douglas Fir Plywood Association,* 261 F. Supp. 154 (D. Ore. 1966), *aff'd,* 399 F.2d 155 (9th Cir. 1968), *cert. denied,* 393 U.S. 1024 (1969). Since ASME is not a trade association and since its individual members have no economic motive for joint anticompetitive activity, the failure of the plaintiff's case follows *a fortiori* from these cases.

In sum, both the panel's novel application of an "apparent authority" theory to antitrust cases and its reliance on a negligence standard of "unintentional participation" are erroneous. Particularly under the circumstances presented, it

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* Of course, this Court has on a number of occasions found a trade association liable under the antitrust laws *when it intentionally restrained trade* by coordinating the economic activities of its members or by excluding competitors. *See, e.g., Eastern States Retail Lumber Dealers Ass'n* v. *United States,* 234 U.S. 600 (1914); *Interstate Circuit* v. *United States,* 306 U.S. 208 (1939); *Fashion Originators Guild of America* v. *FTC,* 312 U.S. 457 (1941). In each of these cases—upon which Hydrolevel expressly relied in its trial brief—the Court found a motive on the part of the association to restrain trade and an intent to do so, both of which are completely lacking here.

follows from this not only that the judgment of the Court of Appeals should be reversed, but that this Court should remand with directions to dismiss the complaint. In the absence of any showing of actual, intentional participation in an antitrust conspiracy by ASME, Hydrolevel's only remaining theory of liability was its allegation that ASME somehow "ratified" the conspiracy of M&M, James and Hardin after its commission. Although the Court of Appeals did not formally decide this issue, it expressly stated in the damages portion of its opinion that:

> "The June 1972 letter was a retraction of the April 1971 interpretation. . . . As ASME's sole contribution to the conspiracy was the April 1971 letter, a suitable retraction . . . was all that was required to free it from further liability for any damages caused by the conspiracy."

A-23. Indeed, there is absolutely no support in the record for Hydrolevel's "ratification" theory, since ASME obviously did nothing to perpetuate the impact of the April 1971 letter once it learned of it, and, as the Court of Appeals expressly found, issued a "suitable retraction." Since Hydrolevel is left with no viable theory for affirming the judgment of liability, the case should be remanded with directions to dismiss the complaint.

POINT III

THE PANEL'S DECISION IS ALSO WRONG AS A MATTER OF POLICY AND WILL HAVE A DISASTROUS EFFECT ON MANY VOLUNTARY ORGANIZATIONS WHICH SERVE THE PUBLIC INTEREST

As demonstrated by the foregoing, the Second Circuit panel has departed from all relevant precedent and enunciated a new standard for vicarious liability under the antitrust laws that is simply wrong as a matter of law. In addition, the application of this new standard to non-profit, voluntary membership organizations, such as ASME, is ill-advised as a matter of policy.

In reaching its decision, the panel inaccurately depicted ASME, on several occasions, as a trade association (A-15 to A-16), and thus failed to consider the role that organizations like ASME actually play in the life of our nation. At least partially as a result of this, the panel also mistakenly concluded that organizations like ASME should bear the risk of loss for any harm caused by wrongful acts of their volunteer members, even when the acts are intended to benefit third parties and are undertaken without the knowledge or consent of the organization. Neither the panel's depiction of ASME nor its conclusion regarding ASME's liability withstands scrutiny.

As previously noted (pp. 2-3, 20-21, 40-41, *supra*), ASME is not a trade association representing the interests of a particular industry or group of business concerns. Rather, it is a scientific and technical association which draws its 100,000 individual members from all segments of society in which mechanical engineers are active. ASME, and similar organizations, exist to serve the public interest rather than the common business interests of their members.

Coming together as volunteers, ASME's diverse membership develops mechanical engineering codes and standards designed to enhance public health and safety, improve

product reliability and facilitate the free flow of commerce.* It has been estimated that such voluntary activities annually mobilize and effectively channel over $320 million worth of manpower and talent for the public good. *See* Hamilton, "The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety and Health," 56 *Texas L. Rev.* 1329, 1332 n. 4 (1978). "[F]or government to undertake the responsibility for all this work would not only significantly increase the direct cost of government but would divert from their main occupations a significant portion of the nation's talented technicians." Wachtel, "Products Standards and Certification Programs", 13 *Antitrust Bulletin* 1, 7 (1978); *see generally* Hamilton, *supra,* 56 *Texas L. Rev.* at 1329-1484; Hogan, "In Defense of Voluntary Products Standards," *MBA* (April 1978); Lange, "Steps to Standards," *Association Management* 6 (August 1965).

More fundamentally, the role and profound importance of voluntary organizations like ASME has been a part of the American system since the founding of the republic. *See* DeTocqueville, *Democracy in America,* Chapter 29 (Mentor ed. 1956). Voluntary groups serving the public interest—bar associations, doctors, accountants, engineers, architects and scientific groups, to name just a few—mobilize and effectively channel billions of dollars worth of manpower and talent for the overall public good. Through the voluntary efforts of these organizations, the quality of life in America is enhanced in a number of ways: through improved public safety and product reliability, greater availability and wider dissemination of appropriate equipment and procedures for industry, better educated professionals for the work force of the country, and maintenance of high ethical and professional

* The strong federal policy of encouraging and fostering voluntary development of safety and performance standards is reflected by Office of Management and Budget Circular No. A-119, 45 Fed. Reg. 4326 (January 21, 1980). The Circular specifically encourages the participation by government employees as professional volunteers on standards writing committees and the reliance by executive branch agencies upon these voluntary product standards for procurement and regulatory purposes, whenever possible.

standards. In no other way has any nation been able to bring so much volunteer talent and dedicated individual effort to the advancement of technology and improvement of the quality of life without undesirable government intervention.

Against this background, the panel's holding is particularly inappropriate. In holding ASME liable for "unintentional participation" in an antitrust conspiracy as a result of the disloyal acts of two volunteer members, the panel has fashioned a new standard of liability which, in effect, makes all such organizations the guarantors of the good faith of their volunteer members. This rule, if allowed to stand, will be literally devastating to any voluntary membership organization that has the misfortune to be deceived by one or more of its members. While instances of abuse, such as in this case, are certainly rare,* a single treble damage antitrust verdict could easily force any non-profit voluntary membership organization out of existence. The chilling effect which this new standard will have on the activities and programs of the many voluntary and professional groups which serve our society is evidenced by the many *amicus curiae* briefs filed in this action.**

Any voluntary membership organization can be maneuvered by a disloyal member familiar with its procedures into innocently taking a position capable of misuse by a third party. It takes no great feat of imagination to foresee situations where, as here, a disloyal member of such an organization actively deceives it and secretly allows a third party to misuse its purpose, goals and procedures for another's benefit. In effect, the panel's opinion makes a voluntary organization strictly liable for antitrust penalties if a member has a piece of official stationery, a position in the

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* ASME has been promulgating and maintaining voluntary safety standards for nearly one hundred years without a single prior instance of abuse of its procedures like that present in this case. The innumerable other professional organizations, of which the *amici curiae* referred to below are representative, have maintained similar exemplary records.

** *Amicus curiae* briefs in support of ASME's petition for certiorari were filed by fifteen voluntary professional organizations concerned about the impact of the Circuit Court's decision on their programs and activities.

organization providing "apparent authority," and the guile to misuse both for his own ends. Subjecting otherwise innocent public service organizations to the awesome penalties of a treble damage award for failing to ferret out or detect such disloyalty is both unprecedented and unwise.

Of equal importance is the fact that the panel's decision misallocates the burden for compensating a third party harmed by an ill-intentioned volunteer's acts. As previously noted, the panel's reliance on *Gleason* v. *Seaboard Air Line Railway Co., supra,* and its apparent rationale for transferring the "risk of loss" to a principal, is clearly inappropriate in this case (*see* pp. 30-35, *supra*). The panel's decision is erroneous for public policy reasons as well. Unlike business corporations, which profit from the acts of their agents and necessarily urge them to maximize such profits, ASME and other non-profit entities are not "better able to bear and to spread," *United States* v. *Ridglea State Bank, supra,* 357 F.2d at 499, the risk of loss in cases such as these. Not only are such non-profit corporations in a far more vulnerable financial position than their profit-making counterparts, but the ultimate effect of any judgment will be upon the capacity of these organizations to serve the public weal rather than upon private investors who benefit from a profit-making corporation's activities.

We do not argue that non-profit, voluntary associations, such as ASME, should be immune from antitrust liability;* we suggest only that holding such an organization strictly liable in treble damages for the unauthorized and unratified acts of volunteer members, that are not taken in furtherance of the organization's objectives or otherwise to benefit the organization, is unprecedented as a matter of law and unwise as a matter of policy. The risk of loss should be placed squarely upon those who explicitly authorized and stood to

* Indeed, ASME has previously entered into a consent decree with the U.S. Department of Justice, by which it agreed to modify its accreditation procedures in regard to foreign manufacturers, in order to ensure compliance with the Sherman Act. *See United States* v. *ASME and National Board of Boiler and Pressure Vessel Inspectors,* 1972 Trade Cases (CCH) ¶ 74,028 (S.D.N.Y. 1972).

profit from the nefarious activity—in this case, James and Hardin and their true principals, ITT/M&M and Hartford.

The panel should have followed the decisions of this Court and the other federal courts and required a showing either that James and Hardin intended to benefit ASME or that ASME knowingly acquiesced in or ratified their acts. In escalating the potential liability of non-profit, voluntary professional associations to allow treble damages under the antitrust laws for "unintentional participation" in the misdeeds of others, the panel has undermined public policy by placing on the backs of all such organizations a potentially insuperable and entirely inappropriate burden. This ill-reasoned new standard of vicarious antitrust liability is wrong as a matter of both law and policy, and grossly extends the federal antitrust laws beyond their proper moorings.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit should be reversed and the complaint dismissed.

Respectfully submitted,

HAROLD R. TYLER, JR.
30 Rockefeller Plaza
New York, New York 10112
(212) 541-4000

Attorney for The American Society of Mechanical Engineers, Inc.

Of Counsel:

RICHARD D. PARSONS
FREDERICK T. DAVIS
STEVEN C. CHAREN
PATTERSON, BELKNAP, WEBB & TYLER
30 Rockefeller Plaza
New York, New York 10112

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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,

Petitioner,

v.

HYDROLEVEL CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

CARL W. SCHWARZ
One Farragut Square South
Washington, D. C. 20006
(202) 347-1631
Attorney for Respondent
Hydrolevel Corporation

STEPHEN P. MURPHY
WILLIAM H. BARRETT
METZGER, SHADYAC & SCHWARZ
Of Counsel

October 20, 1981

QUESTIONS PRESENTED

1. Whether the record supports the verdict of the jury that the ASME, a private membership organization that administers a program of mandatory standards for the nation's boiler industry, engaged in a combination or conspiracy in restraint of, and to monopolize, the market for boiler water level controls.

2. Whether non-profit private groups that administer industrial standard-setting programs should be exempt from the traditional rules of *respondeat superior* in antitrust cases.

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STATEMENT OF THE CASE

A. The Parties

Petitioner, The American Society of Mechanical Engineers, Inc. ("ASME"), is a private membership association of mechanical engineers. Through its governing Council and a staff of full-time officers and employees the ASME conducts a variety of professional activities of interest to its members. In addition to these activities, through committees and subcommittees of members and non-members, the ASME develops and publishes a large number of industry codes and standards. Revenue from the sale of these codes and standards, and from associated product "Certification Programs," accounts for the great bulk of the ASME's income and supports the society's educational and professional activities. *See* n. 41 *infra.*

One of the industry codes administered by the ASME is the Boiler and Pressure Vessel Code (the "Code") which sets certain standards for boilers, pressure vessels and their appurtenances. An implicit purpose and the obvious effect of the Code, as indeed with all standard-setting and certification programs, is to keep non-complying products off the market. Because the Code has been incorporated by reference into the laws of nearly every state and province in the United States and Canada, compliance with Code standards is literally mandatory if a boiler or pressure vessel manufacturer, or a manufacturer of boiler water level controls (the product involved in this case),[1] is to be able to market such a product in the United States or Canada. *See* PX 30A at Exhibit H (App. 666); App. 230-32, 422-23, 474-76; ASME Br. 5.[2]

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[1] A boiler water level control senses when the water level in a boiler reaches the minimum point established by the manufacturer and then automatically either adds water to the boiler (a "feed water" control) or shuts off the heat supply to the boiler (a "low water fuel cut-off" control).
acquired a controlling interest in Hartford through Hartford Fire Insurance

[2] Citations to the record and appendix will follow the same format as that utilized in the ASME Brief (ASME Br. 2 n.*). The underlining and marginal notes in the trial transcript as contained in the photocopied Joint Appendix in the Court of Appeals are solely the responsibility of the ASME and its counsel.

The Code is written, revised and interpreted by the ASME through its Boiler and Pressure Vessel Committee (the "Main Committee") and subcommittees of the Main Committee pursuant to an express delegation of authority from the ASME Council. AX V. 174. The ASME is the only private standard-setting body that regularly issues interpretations of its "codes." App. 646. The Code provisions covering boiler water levels controls fall within the jurisdiction of the "Section IV Subcommittee" of the Main Committee. Many of the Committee and Subcommittee members are employed by corporations or firms having a commercial interest in some aspect of the boiler industry and which continue to pay the committee member's salary and expenses while he is engaged in ASME activities. *E.g.*, PX 16A at 188 (HX V. 196; App. 499, 502), J.A. 110.

In 1971, Mr. T. R. Hardin was Chairman and Mr. John W. James was Vice Chairman of the Section IV Subcommittee. Hardin was a Vice President of Hartford Steam Boiler Inspection and Insurance Co. ("Hartford"), the nation's largest insurer of boilers, and James was Vice President, Engineering, of McDonnell & Miller, Inc. ("M&M"), the nation's largest manufacturer of boiler water level controls.[3] Hardin had been a member of the Main Committee since 1949 and had been Chairman of the Section IV Subcommittee since 1963. PX 30A at "Defendant's Answers," pp. 15-16. James, who played a major role in revising the Code provisions relating to boiler controls, had been with M&M since 1948 and for 23 years he had acted as a member, Vice Chairman and Chairman of the Section IV Subcommittee. *Id.;* App. 853; PX 3 at Exhibit 1 (HX V. 61-62; App. 561-62), J.A. 85-87. As far as the ASME could tell, during that time no officer or employee of any other manufacturer of boiler water level controls served on the Main Committee or any of its subcommittees. App. 701-03, 709-10; J.A. 76-81. *See also* PX 16A at 189-90 (testimony of Mr. James). M&M recognized the value of James' status and power at the ASME in a 1973 memorandum by a top company official:

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[3] In late 1970, International Telephone and Telegraph Corp. ("ITT") acquired a controlling interest in Hartford through Hartford Fire Insurance Co. (App. 940-41) and in early 1971 ITT was negotiating to acquire M&M. ITT finally acquired M&M on December 12, 1971.

> A major reason for the continued success at M&M is a result of [James'] efforts and skill in influencing the various code making bodies to "legislate" in favor of M&M products. This has been a planned strategy for the business under E. N. McDonnell and carried out with considerable success as evidenced by the M&M market penetration of 70 plus %. . . . It is of vital importance to M&M to maintain the continuity of John's influence as above. . . . In this circumstance his seniority is a distinct plus for both experience and influence.

HX V. 61-62, J.A. 85-87.

M&M was founded in 1920 by the late E. N. McDonnell and has traditionally maintained 75% to more than 85% of the boiler water level control market. ASME Br. 3. This market success was achieved despite the "impediment of being higher in market price than its competitors." PX 33A at 352, 354 (HX V. 632, 634; App. 583).

M&M's product employed the "float" principle, whereby a floating bulb would, in theory, drop with a falling water level, thus activating a switch through a mechanical linkage, much the same as the "float" in the household toilet tank. In practice, however, the "float" experienced many types of malfunction. Sedimentation, corrosion and mechanical blockage of its moving parts over time were the principal causes of failure for "float" controls. App. 359-69.[4] Despite these shortcomings, M&M chose to stick with the "float" (PX 14 at 43-45 (HX V. 163-65; App. 569, 570)), and sought to perpetuate its market dominance through favorable ASME "legislation."

Hydrolevel Corporation ("Hydrolevel") was organized in 1965 by the late Michael DeLeonardis, his son Dominick and the late Russell Rymer. Like M&M, the new company manufactured and sold only one product: its newly-developed,

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[4] There were nearly 100 major boiler failures in the U.S. in 1971 which were attributed to the failure of water level controls. PX 12A at 8 (App. 566, 567). Although failures of M&M controls occurred at a significant rate and resulted in substantial property damage and personal injury (PX 32 (HX V. 523-626; App. 582)), Hydrolevel controls had never been known to cause such problems. App. 199, 781.

revolutionary, horizontal "probe-type" boiler water level control. Unlike the "float" control, Hydrolevel's "probe" control used no moving parts. It consisted of a single horizontal electrode, with a unique configuration patented by Michael DeLeonardis, where the boiler water itself completed an electric circuit. When the water level dropped below the electrode, the circuit was broken and thereby cut off the fuel supply to the boiler or activated a pump to refill the boiler with water. Hydrolevel's probe was "fail-safe," meaning that if the circuit was broken by a failure of the control, the fuel supply would be cut off, a safe condition. It has never experienced a malfunction. App. 199, 781; PX 18B at 166 (HX V. 340; App. 498, 502). Indeed, despite the remark by the Court of Appeals that there was an "engineering debate over which kind of cut-off is better . . ." (A-5), the evidence at trial was uncontroverted that the Hydrolevel product was a significant advance over prior technology. App. 382-88, 406-09, 419-21, 940, 1105, 1272-75, 1648-50; PX 11 at 96-97 (HX V. 86-87; App. 565-66); PX 26 at HT 86, 559, 574-75, 609, 612 (App. 154); PX 46 (HX V. 810-11; App. 249).

The new company attracted immediate and substantial financial support from the venture capital subsidiary of the Chase Manhattan Bank. A few years after it was organized, Hydrolevel had developed a nationwide sales coverage and a productive capacity, which it never had a chance to utilize, to manufacture 100,000 controls (more than 20% of the market) annually. App. 164-66; 176-77; HX V. 632-33.

B. The Formation of the ASME Conspiracy

The Brooklyn Union Gas Co. ("BUG") was an innovative leader in the utility field as well as a major merchandiser of heating boilers in its own right. App. 354. BUG had been very dissatisfied with the M&M "float" on its boilers as a result of numerous and costly warranty-covered boiler losses. App. 358-62. BUG therefore had been looking for a more reliable control and in 1969 the Hydrolevel product caught its attention. After some additional design work which radically reduced the price of the Hydrolevel control (App. 178-79), BUG and one of its boiler manufacturer-suppliers, Weil-McLain, Inc., subjected

the Hydrolevel probe to extremely rigorous testing. App. 384-85, 391-97, 413-19. The Weil-McLain tests demonstrated that under highly unusual and artificial laboratory conditions the water in a steam boiler would surge and bubble so that the probe's electrode would be alternately covered and uncovered, producing an undesirable off-on-off "chattering." Hydrolevel therefore incorporated a time delay feature into the control circuit of the probe which, by retarding the operation of the cut-off for a few seconds after the electrode was uncovered, prevented the "chattering" that had been the only even theoretical problem found to exist with the Hydrolevel probe.

In early 1971 BUG determined to standardize on Hydrolevel controls for *all* boilers sold by BUG and to require replacement of faulty M&M controls with the Hydrolevel product. App. 179, 387-88, 400-01, 416; HX V. 301-08. Moreover, at the same time, the Hydrolevel control received the endorsement of the Factory Mutual Insurance Co. as a "fail safe" control. HX V. 99, 499 (A). These important endorsements by two of the industry's major factors poised Hydrolevel for a market breakthrough while it still had the only horizontal probe control on the market.

To counter this new competitive threat to M&M's monopoly position, two meetings were held in Chicago in March of 1971. The first meeting was attended by Messrs. Hardin and James and Eugene Mitchell, M&M's Vice President of Sales. The second meeting, over dinner at the Drake Hotel, was joined by James Solon, M&M's new President. One of the subjects discussed at these meetings was how the Code would be applied to a control with a time-delay. HX V. 197-98; PX 18A at 378-86 (HX V. 309-17; App. 498-99). The participants to the meetings conceded that they clearly understood that the product under discussion was the Hydrolevel control. HX V. 173-75, 202-03, 317.

It was decided at these meetings that M&M would send a letter to the ASME inquiring whether a time delay was acceptable under the Code. HX V. 206-10, 213-16, 318-19. According to Solon, Hardin told M&M to put the inquiry letter into a "definite form" so that it would elicit the desired

response, *viz.*, that the Hydrolevel product didn't comply with the Code. HX V. 173-74. James and Hardin not only discussed the inquiry and exchanged correspondence as to its language (HX V. 209-10, 216-24, 321-24), but they also discussed the substance of the response which M&M would receive from the ASME. HX V. 231-32, 236-37, 247-52, 323.[5]

The result of these conversations and correspondence was an M&M letter dated April 12, 1971, drafted by James (with Hardin's assistance) but signed by Mitchell to avoid the appearance of a conflict of interest on the part of James. PX 38 (HX V. 388; App. 215-16), J.A. 62; HX V. 225-30, 320-28. The letter was addressed to the Secretary of the Main Committee, Mr. W. B. Hoyt, the ASME officer expressly delegated the responsibility by the ASME's governing Council for responding to inquiries seeking interpretations of the Code and for "supervising" the activities of the Main Committee. J.A. 120; AX V. 174, 179-181.

The April 12 letter asked whether it was consistent with the "intent" of Para. HG-605 of the Code to have a time delay feature on a low-water fuel cutoff. J.A. 62. The letter was referred by Hoyt (who, despite his responsibilities, had no expertise in this area) to Hardin, as Chairman of the Section IV Subcommittee. After Hardin and James collaborated on the wording of the ASME response, on April 27, 1971, Hardin sent his proposed language to Hoyt, with copies indicated to the Chairman and Vice Chairman of the Main Committee,[6] for incorporation into a formal ASME reply. The ASME response was signed and issued by Hoyt (on ASME letterhead) the same day it was received from Hardin, April 29, 1971, and in exactly

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[5] The ASME file of correspondence between James and Hardin on this subject was later destroyed by James after he was tipped off by Mr. W. B. Hoyt, the Main Committee Secretary (and full-time ASME officer), that the matter was being investigated by a *Wall Street Journal* reporter. HX V. 247-49. *See* p. 12 *infra*.

[6] At p. 37 n.* of the ASME Brief, it is claimed that the April 29, 1971 letter "passed review" by the Chairman and the Vice Chairman of the Main Committee. To the contrary, there is absolutely nothing in the record to indicate that those gentlemen "reviewed," saw or even received copies of Hardin's draft, which was issued by Hoyt immediately after he received it.

the language Hardin had proposed. *Compare* J.A. 63 *with* PX 39 (AX V. 10), J.A. 64. Despite the fact that the ASME internal procedures labelled such a letter "unofficial," it was, as far as Hoyt and the public were concerned, the "official" pronouncement of the ASME. App. 192; J.A. 115, 125-26. A photocopy of the letter is appended to this Brief.

There was conflicting evidence at trial as to whether the manner in which Hardin and Hoyt handled the M&M inquiry and the ASME's response was "routine," "regular" and "according to standard ASME procedures," as argued by the ASME, or whether it was irregular. According to the internal procedures of the Main Committee, under certain circumstances Subcommittee Chairmen could respond to public inquiries concerning the Code when referred to them by the Secretary of the Main Committee. AX V. 184. The ASME introduced evidence that Hoyt acted strictly according to established ASME procedures in referring the inquiry to Hardin for response, that Hardin acted according to ASME procedures in drafting the reply for Hoyt's signature and that Hoyt did nothing unusual in sending the letter out to M&M immediately upon receipt of the draft from Hardin. App. 863-65, 903-04; PX 18C at Exh. 5 (AX V. 7; App. 573); AX V. 6; J.A. 63-64; ASME Br. at 5-6, 8-9. Hydrolevel took the position that Hoyt and Hardin handled the inquiry and response in a manner inconsistent with "standard ASME procedures," that this justified the inference that Hoyt was aware of the scheme concocted by Hardin and James and that Hoyt's actions ensured that success of the plan. *Compare* PX 9B (AX V. 3-6; App. 564) *with* J.A. 121-26; HX V. 262-63.

The April 29, 1971 ASME letter consisted of two substantive paragraphs. Hydrolevel argued that the first paragraph of the letter set forth a standard not in the Code and that the second paragraph expressly questioned whether a low-water cutoff with a time delay could ever meet that standard. The clear but false implication of the entire ASME letter was that such a control could *not* meet the ASME Code. AX V. 133-36. This position was supported by the opinion of the *ASME's own expert witness* after seeing the misleading ASME letter for the first time and was also the reaction of a member of the ASME's

Main Committee. PX 2 at 113-21 (AX V. 129-37; App. 560-61), J.A. 83, 113. Nevertheless, the ASME contended that the April 29, 1971 letter was accurate and not misleading, was not "rigged," and was "a perfectly sensible reading of the code." App. 929-30, 1100.

M&M immediately distributed the ASME response and discussed it with various boiler manufacturers, including the boiler suppliers to BUG, and with other firms in the boiler industry. ASME Br. at 9.[7] M&M also produced a sales kit titled "The Opposition, Who They Are and How to Beat Them" (HX V. 473-95), which was used by M&M sales representatives with customers and which included a copy of the ASME letter. The kit identified Hydrolevel by name and flatly stated that the Hydrolevel product did not meet the Code. The entire industry was therefore "educated" that the Hydrolevel product did not comply with the Code. Except for orders from BUG (which stuck to its decision to standardize on Hydrolevel), Hydrolevel's sales flattened out; none of the boiler manufacturers supplying BUG who had seen or heard of the ASME letter bought Hydrolevel controls for boiler sales other than to BUG. App. 223-24, 229-33.

C. The ASME Ratifies the Conspiracy

Hydrolevel remained unaware of the existence of the April 29, 1971 ASME letter for nearly nine months, until January, 1972, when one of BUG's boiler suppliers told Dominick DeLeonardis that he did not want to buy the Hydrolevel product (despite the BUG specification) because *it did not meet the Code as reflected in an ASME letter.* App. 186; J.A. 114-15. The supplier refused to tell DeLeonardis more about the letter because he had promised to keep silent when it was shown to him. J.A. 114-15.

DeLeonardis wrote directly to Hoyt at the ASME on January 25, 1972 and demanded a copy of the letter. PX 40

[7] On April 20, 1971, *nine days before the ASME letter went out,* but obviously already aware of the content of the ASME's forthcoming letter, M&M's Gene Mitchell telephoned BUG and stated that the Hydrolevel control did not meet the Code. App. 402-05; HX V. 384(A)—(B).

(HX V. 754; App. 215), J.A. 65. Hoyt's assistant wrote back on February 8, 1972 by quoting the body of the April 29, 1971 letter but omitting the name and address of M&M, the addressee, and deleting the sentence which showed who drafted the response. PX 41 (AX V. 22; App. 215), J.A. 66-67; App. 187-93. A photocopy of the letter is appended to this Brief. Thus frustrated, and still unable to identify the principals in the matter, Hydrolevel's President, Russell Rymer, wrote to Hoyt on March 23, 1972, with copies to every Main Committee and Section IV Subcommittee member, demanding that the ASME permit Hydrolevel to confront its accusers and, despite the serious damage that had already occurred, that a corrective statement be circulated "among all who might reasonably have become privy to [the April 29th] letter." J.A. 68-73. On March 27, 1972, Hoyt replied enclosing a redacted copy of the original letter, again leaving out the critical identification of those who were behind the scheme. PX 16B at Exhibit 25 (AX V. 38-39; App. 570, 591), J.A. 74-75. At no time did the ASME ever give Hydrolevel a complete copy of the original April 29, 1971 ASME letter. App. 195.[8]

On May 4, 1972, the full ASME Section IV Subcommittee held a meeting to discuss the demands made in Hydrolevel's March 23, 1972 letter and to consider a formal ASME response. At that meeting John James, by then having been promoted to

[8] It was precisely at that time that the ASME was negotiating to settle unrelated antitrust conspiracy charges which had been filed in 1970 by the U.S. Department of Justice and which challenged the exclusion, through the Code, of foreign boilers from the U.S. market, an exclusion which obviously benefitted many of the employers of the ASME's "code developers." *United States v. The American Society of Mechanical Engineers, Inc.*, [1972] Trade Cases (CCH) ¶ 74,029 (S.D.N.Y., consent decree filed June 13, 1972). Indeed, the "potential legal involvements" of the Hydrolevel case were the subject of correspondence circulating among James, Hoyt and other senior ASME officials at the same time Hydrolevel was still struggling to investigate the circumstances of the 1971 ASME letter. HX V. 266-70. Hoyt even warned James to be careful in his future ASME correspondence to downplay his position with M&M and thus to "avoid any unpleasant misinterpretations by the Justice Department or others." *Id.* There is no question that the top levels of the ASME were fully aware of the antitrust dangers involved in "code developing" activities by those with a commercial interest in the market.

Chairman of the Subcommittee, stepped down briefly from the chair during the Hydrolevel discussion, thereby admitting that his position in the matter involved a conflict of interest. J.A. 111-12; App. 808-11. The Subcommittee voted to re-issue the April 29, 1971 letter with the second paragraph deleted. This decision was reported to the Main Committee at its meeting the following day by James, a meeting in which James fully participated. As Melvin Green, the ASME's Managing Director of Codes and Standards explained it, James' conflict of interest had importance only at the Subcommittee level, not at the Main Committee level. App. 806-11; J.A. 118-19.

Because a few Main Committee members wanted the ASME response specifically to state that a time-delay was not prohibited by the Code, it was decided to prepare a more elaborate response to Hydrolevel than that proposed by the Subcommittee. The job of drafting a suitable response was delegated by Mr. Zick, the Chairman of the Main Committee, to a two member "Task Group," made up of long-time subcommittee members Harrison and Dow. James, however, dissatisfied that the Main Committee did not rubber-stamp the Subcommittee's decision simply to re-issue the first paragraph of the original letter, was permitted to participate in the drafting process.[9] James specifically suggested a concluding paragraph for the ASME's draft response which Harrison incorporated *in haec verba* into the suggested official reply and which, in referring to the time-delay's acceptability under the Code, was cautionary in tone and not even vaguely corrective of the original letter. AX V. 48-54, 68-69, 73-74. The response, as finally drafted, expressly *"confirmed the intent" of the original letter* but made no specific reference to the original April 29, 1971 letter that had been so widely distributed. PX 45 (AX V. 77; App. 216), J.A. 84; HX V. 240-44. This is the letter that the Court of Appeals later decided was a "retraction" of the original letter, a finding clearly at odds with the jury's verdict.

[9] At the Main Committee meeting, in connection with the discussion whether to "reaffirm" the first paragraph of the original letter, one committee member remarked that "[i]f I were the man receiving that [first paragraph] I would read it as prohibiting my device." J.A. 83.

(footnote continued on next page)

James himself circulated the final draft of the ASME response to the members of the Section IV Subcommittee on May 22, 1972. In his cover letter, James noted that the proposed response was "somewhat at variance" with what the Subcommittee had decided to do at its May 4 meeting because, he falsely represented, some of the Main Committee members wanted the response to state that a time-delay was permissible "with limitations." The "limitations" in the last paragraph of the draft had, of course, been supplied by James. AX V. 70, 73-74. The draft response was also mailed to all of the members attending the Main Committee meeting as the sixth appendix to over fifty pages of minutes. App. 837; AX V. 60-67.[10]

When no member of the Main Committee objected to the draft letter, it was finalized without substantial change and sent by the ASME *only to Hydrolevel* on June 9, 1972. A photocopy of the letter is appended to this Brief. It is important to note that at no point in the entire process leading up to the issuance of the June 9, 1972 "official" letter was there even the slightest suggestion that Hoyt's original April 29, 1971 letter was unauthorized, *ultra vires* or otherwise not binding upon the ASME, or that Hardin or Hoyt had acted outside the scope of

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(footnote continued from previous page)

There was a good reason for James to persist in his effort to eliminate Hydrolevel. At that time he was working within the ASME to extend the Code's coverage to a broader class of boiler products for which a probe control was particularly suitable. HX V 362-63. M&M, under the direction of James, was at the same time busily trying to "invent around" the Hydrolevel patents and was developing a competitive horizontal probe of its own, which it finally brought to the market in 1974. App. 244; PX 11 at 36-43, 49-57.

[10] The conclusion of the Court of Appeals that the draft June 9, 1972 letter had been given wide distribution by the ASME to "over 300 people active in the boiler market" (A-23), was based upon a mischaracterization of the facts in the ASME's Brief to the Court of Appeals. The draft letter was sent to the *186* (not "over 300") people on the list of attendees at the committee meetings on May 4 and 5, 1972. J.A. 76-81; App. 673. After eliminating 34 names that are repeated more than once, 21 employees of ITT, Hartford and ASME, 12 foreigners and 27 duplicate company representatives, only 92 names remain of the original 186. Of those 92, only one recipient of the draft response was employed by a substantial purchaser of controls (J.A. 76-81; PX 35A (HX V. 710-11; App. 582-83)), and there is nothing in the record to indicate that this person, or any other alleged recipient, noticed the draft letter buried in the mass of routine committee material.

their authority in issuing it. Moreover, nothing in the record indicates that anyone at the ASME or any customer or potential customer of Hydrolevel considered the June 9, 1972 letter to have "retracted" the original April 29, 1971 letter or that the letter was anything other than a "confirmation" of the original letter.[11] To the contrary, there is evidence in the record that the few people who were shown the letter by Hydrolevel *still* considered the Hydrolevel product to be unacceptable under the Code. J.A. 117; App. 346-47.

Two years later, in the Spring of 1974, Priscilla Meyer, a reporter for the *Wall Street Journal,* took an interest in Hydrolevel's plight. When Miss Meyer contacted Hoyt asking for the identity of the author of the April 12, 1971 inquiry, Hoyt promptly tipped off James that a reporter had been asking questions about the Hydrolevel affair. HX V. 247-49, 513. James' immediate reaction was to destroy the ASME's file on the subject, including the only known copies of the Hardin-James correspondence, because he was "scared." HX V. 257-59. Miss Meyer's article was published on July 9, 1974. PX 5 at Exhibit 13 (AX V. 88-90; App. 563), J.A. 94-98.

In response to the *Wall Street Journal* article, ITT's lawyers prepared a letter for James' signature to the ASME (on ASME letterhead). J.A. 91-93. This letter, dated August 9, 1974, admitted many of the key allegations in the *Journal* article, including the fact that M&M had been using the letter with potential Hydrolevel customers, but denied (falsely) that he, James, had participated in the drafting of the April 29, 1971 letter. *Id.* Also in response to the *Journal* article, Mr. Paul T. Howse, Jr., an ASME Vice President and a member of the ASME's governing Council (App. 751-52), wrote the President of the ASME on July 25, 1974 that if the facts as stated in the *Wall Street Journal* were true, the ASME had been unfairly restraining Hydrolevel from marketing its product and that Mr.

[11] Trial counsel for ASME stipulated that the ASME never published any statement in its *Mechanical Engineering* magazine or in any other trade publication indicating that the Hydrolevel boiler water level controls met the ASME Code and never sent a letter of apology to Hydrolevel. App. 753-54. Moreover, the ASME never made any effort to identify those people who had been "educated" by M&M with the April 29, 1971 letter and never attempted to contact anyone who had received the letter in the first instance.

James should be relieved of his committee duties and expelled from the ASME for "unethical conduct." J.A. 99-100. If the *Journal's* facts were accurate, Mr. Howse said, a full page apology to Hydrolevel should be published "in all pertinent trade publications stating the facts and affirming that the Hydrolevel Control does meet ASME codes." *Id.* He urgently requested immediate Executive Committee consideration of the matters disclosed by the article. *Id.*[12]

Not only was Mr. James not removed from his ASME duties, even after his own letter showed the *Journal's* facts to be correct, but Mr. Howse's requests were never even placed on the ASME Executive Committee agenda. App. 753-56. Instead, the ASME's "Professional Practice Committee" purported to conduct an investigation of the "entire incident" in late 1974, and, *without even interviewing* Mr. James or any of the other participants in the creation of the April 29, 1971 letter, promptly "found no basis for further consideration of the issue . . . ." App. 801-06; PX 17A at 99 (HX V. 289; App. 572-73); J.A. 103-04. The result of this non-inquiry was an ASME resolution dated November 19, 1974, drafted by the Professional Practice Committee and later edited and published in the ASME's national magazine, *Mechanical Engineering.* App. 801; J.A. 101-04. The resolution was *cleared as to content with James himself,* pointedly "commended" Mr. James for "conducting himself in a forthright manner" and castigated the *Wall Street Journal* for "harrassing" James and other ASME Committee members for activities *"in their line of duty."* App. 801-04; HX V. 284-93; J.A. 103-04. (emphasis added).

In the Summer of 1974, while the staff of the Senate Antitrust and Monopoly Subcommittee was preparing for hearings on "voluntary" standard-setting, they noticed the *Wall Street Journal* article and conducted interviews of the principal actors. It was during the staff's interview of John James, and in the subsequent public hearing, that James disclosed his destruction of the ASME's file. HX V. 253-56.[13] The Senate Hearings

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[12] The district court described Mr. Howse's letter as a "very powerful indication that the highest level" of the ASME was fully aware of the full implications of the scheme. App. 758-59.

[13] *Voluntary Industrial Standards, Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 94th Cong., 1st Sess. (1975).

prompted a second *Wall Street Journal* article on April 7, 1975, which caused Mr. William A. Shearer, Jr., another member of the ASME Council (App. 792-93), to write to the ASME on April 16, 1975 condemning James' role in the Professional Practice Committee's "James resolution" and taking the ASME to task for not "ferret[ing] out more information." J.A. 108-09. He urged that Mr. James at least be *interviewed* by the ASME and requested that procedures be set up within the Professional Practice Committee to counter the charge that "codes are self-serving to some of the supporting organizations." *Id.* *Not one* of Mr. Shearer's recommendations was acted upon by the ASME and, although the "James investigation" was later "re-opened" by the ASME, it was again promptly adjourned, this time indefinitely.[14] The ASME has continued to close ranks around Hardin, James and Hoyt until this very day; no action has ever been taken by the ASME against anyone in connection with this matter. HX V. 294.

The industry perception that Hydrolevel's product did not meet the Code proved impossible to overcome while Hydrolevel's "window of opportunity" was still open, *i.e.*, before M&M, still dominating the industry as a unit of ITT, brought out its competitive probe in 1974. App. 233-34, 346-47, 473-87, 937-39; HX V. 499, 507-08, 774-75. When that fact became obvious, Hydrolevel's source of financing "pulled the plug." App. 1399-400. On January 9, 1979, after several more years of flat U.S. sales[15] and after the funds received from the settlements in this case were exhausted, Hydrolevel's assets, except for this lawsuit, were sold for "salvage value."

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[14] According to the ASME, the last "investigation" was adjourned on advice of counsel because of the pendency of this lawsuit. ASME Ct. of App. Br. 14. By thus permitting "business as usual" to continue at the ASME for the last nine years, the ASME not only sealed Hydrolevel's fate, but demonstrated a total lack of interest in preventing recurrences of the same anticompetitive behavior. We think it obvious that no meaningful internal investigation will ever be resumed if the ASME's vicarious liability arguments prevail in this Court.

[15] There was a markedly different commercial acceptance of the Hydrolevel product in the untainted but far smaller Canadian market where the ASME letter was not circulated. In that market the Hydrolevel probe virtually *displaced* the M&M float in a short period of time. App. 506-14.

D. The Litigation in the District Court

Hydrolevel filed this action in August, 1975 naming the ASME, Hartford and ITT as defendants. By June of 1978, suffering continuing financial reverses and after more than three years of pretrial proceedings, Hydrolevel had settled with ITT and Hartford for a total of $800,000, expressly preserving its right to proceed against the remaining defendant ASME for the balance of its damages. App. 47-50. An amended complaint was filed charging the ASME, *inter alia,* with having engaged in a combination and conspiracy in restraint of trade and to monopolize the boiler water level control market, in violation of Sections 1 and 2 of the Sherman Act.

A bifurcated jury trial began on January 22, 1979, before the United States District Court for the Eastern District of New York, the Honorable Jack B. Weinstein, presiding. ASME's trial strategy was designed to obtain total exculpation, not only for the ASME, but for Hardin, James and Hoyt as well. As noted above, *supra,* p.7-8, the ASME took the position at trial that the ASME's April 29, 1971 letter was an accurate and proper product of its code-developing machinery and that the ASME stood by it. The ASME *never* pleaded, proved or even argued that the June 9, 1972 letter was a "retraction" (because it continued to claim that there was nothing to "retract") or that the ASME ever withdrew from a conspiracy to restrain Hydrolevel's trade (because it continued to claim that there was no such conspiracy). Alternatively, the ASME argued that even if there was a conspiracy to create a misleading interpretation, it should not be held responsible for it because "the ASME" (now conveniently defined to exclude Committee officers like Hardin and James because they were "volunteers") did not know of it and could not have benefitted financially from the elimination of Hydrolevel.

The proposed jury instructions submitted by both sides were almost identical with respect to the general principle of corporate liability for the acts of agents and employees, and both sides requested a charge covering actual *and apparent* authority under general agency law principles. Hydrolevel's

proposal would have instructed the jury that an "intent to benefit" the ASME was not necessary for liability and the ASME's proposal would have required the ASME to have actually "profited" from the activity. *Compare* Hydrolevel Requested Jury Charge No. 28 *with* ASME's Requested Charge No. 4, J.A. 59-61.

The district court adopted virtually all of the ASME's proposed requests to charge, including its proposed liability charge. App. 964, 966, 1172-73; J.A. 47-48. Furthermore, the court charged the jury that unless "ratified or adopted" by the ASME, acts by ASME agents or employees done for their own benefit or for the benefit of others, and not for the ASME's benefit, could not bind the ASME. J.A. 49. Judge Weinstein explained to the jury, however, that "benefit" did not necessarily mean "gain" but that the jury could, and should, consider the "motive" of the agent in deciding whether he was acting for the "benefit" of the organization. J.A. 48.

The Court expressly charged that the jury could find the ASME liable if it concluded that the ASME had ratified or adopted the acts of its officers and agents even in the absence of an "intent to benefit." App. 1175; J.A 49. On this point, Judge Weinstein instructed the jury to consider ASME's "action or failure to act, when the actions of individual staff or committee members came to wider attention within the defendant." App. 1181, J.A. 52. *ASME's counsel declared that the court's charge to the jury was "satisfactory."*[16] App. 1192, J.A. 58. With the approval of ASME counsel, a transcript of the charge was given to the jury and a general verdict for the plaintiff was returned under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2.

The damage phase of the trial, before the same jury, resulted in a verdict in favor of Hydrolevel in the amount of $3.3 million, considerably less than the $5.3 million which plaintiff's evidence indicated was the minimum estimated damage sustained by Hydrolevel, but well within the range that the

[16] The only aspect of the charge to which the ASME took exception was the Court's refusal to charge the jury as to certain comments by Hydrolevel's counsel, a matter that is not at issue here.

ASME's own damage expert considered reasonable. App. 1632-33. ASME's post-trial motions were denied. AX V. 216-35; J.A. 7. Judge Weinstein then deducted the amounts of the ITT and Hartford settlements from the verdict before trebling, denied plaintiff's application for the award of a reasonable attorneys' fee, and entered judgment against the ASME for $7.5 million.

E. The Appeal

Both sides appealed to the United States Court of Appeals for the Second Circuit. The ASME argued that the evidence did not justify the jury's liability verdict under either the "benefit" or the "ratification/adoption" standards contained in Judge Weinstein's vicarious liability charge.[17] Hydrolevel, in opposition, contended that there was abundant evidence in the record from which the jury could have properly inferred that Hardin, James and Hoyt acted on behalf of, or for the "benefit" of, the ASME or that the ASME "ratified" or "adopted" their acts. The ASME continued to insist that the April 29, 1971 letter "provided a common-sense and reasonable interpretation of the Code" which was entirely consistent with the ASME's "objectives of and procedures for protecting public safety." ASME Ct. of App. Reply Br. 2, 3. It was never suggested to the Court of Appeals that the June 9, 1972 letter should be viewed as a "retraction" or a "withdrawal" from the conspiracy.

The Court of Appeals determined that it was *not necessary* to resolve the question whether the record supported the jury's verdict under the "benefit" or "ratification/adoption" charge given by the court[18] because that charge was more favorable to the ASME than the law required. The Court said that neither an "intent to benefit," nor "ratification" was necessary for the

[17] The ASME also attacked the propriety of the jury's damage verdict. Hydrolevel appealed the district court's denial of attorneys' fees as well as the deduction of the settlement amounts prior to trebling.

[18] A-13. The ASME's Brief incorrectly claims that the Court of Appeals "tacitly assumed" that such evidence was lacking. ASME Br. 27.

ASME to be bound by the actions of Hardin, James and Hoyt in the circumstances of this case because these men had clearly been given the "apparent authority" to generate code interpretations such as the April 29, 1971 letter. The Court of Appeals affirmed the liability verdict on that ground.

Nevertheless, expressing sympathy for the ASME's predicament, the Court of Appeals ruled that the ASME should not be responsible for the full damage done to Hydrolevel by the scheme because the ASME was, in the Court's view, "far [less] culpable" than M&M or Hartford.[19] Without citing any authority and never mentioning the strict requirements for "withdrawal" from a conspiracy, the Court fashioned a rule that a conspirator's participation in a conspiracy could be "retracted" so as to terminate any further responsibility for continuing damage resulting from the conspiracy. The Court considered the June 9, 1972 ASME letter to Hydrolevel to be such a "retraction," despite the fact that it "confirmed the intent" of the letter supposedly "retracted," despite the fact that the ASME never pleaded or argued a "retraction" theory, and despite the fact that the jury's damage verdict, just as its liability verdict, had as its legal predicate the ASME's own proposed charge (which did not so much as mention "retraction"). App. 1674-87, 1734-35. On this basis the jury's damage verdict was reversed by the Court of Appeals and a new damage trial was ordered. In closing, the Court of Appeals noted that it felt the ASME's role in the conspiracy was "unintentional," and that on remand the trial court should "restrict" Hydrolevel's expert testimony as to damages (which had not been objected to by the ASME) in order to produce a damage figure that the *Court of Appeals* considered to be "more in keeping with the harm Hydrolevel suffered." A-26.[20]

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[19] The Court of Appeal's opinion was rendered prior to this Court's opinion in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. ____, 68 L.Ed. 2d 500 (1981), which expressly confirmed the traditional rule that antitrust conspirators are jointly and severally liable for all of the reasonably forseeable damage resulting from a conspiracy to restrain trade and that there is no right of contribution from joint antitrust tort-feasors.

[20] The Court of Appeals reversed Judge Weinstein's denial of attorneys' fees, as well as the deduction of the settlement amounts prior to trebling, and the ASME did not seek *certiorari* on these points.

Both Hydrolevel and the ASME petitioned this Court for writs of certiorari. The ASME's petition, raising the liability issue discussed herein, was granted on June 15, 1981. Hydrolevel's petition, No. 80-1771, concerning the Court of Appeals' ruling that the June 9, 1972 letter "retracted" the ASME's participation in the conspiracy and the substitution of the Court's own view of "the harm Hydrolevel suffered" for that of the jury, has not yet been acted upon.

SUMMARY OF ARGUMENT

Throughout this appeal, the ASME has pressed two conflicting theses. On the one hand, as it did at trial, the ASME claims that the conduct of Hardin, James and Hoyt in drafting and issuing the April 29, 1971 interpretive letter was "regular," "routine," "according to standard ASME procedures" and a necessary function of the ASME's "code-developing" activities. Moreover, the ASME has repeatedly characterized that letter as "a perfectly sensible reading" and a "straight-forward interpretation" of the Code that was "misinterpreted" and "misused" by M&M. On the other hand, recognizing the validity of the jury's verdict that there was in fact a conspiracy to use the ASME's power over the industry to destroy Hydrolevel, it labels Hardin and James (conveniently ignoring Hoyt) as "dishonest" "volunteers" who were "secretly" acting solely for M&M in "concocting," "manipulating" and "distorting" the ASME Code to further their own monopolistic objectives. The ASME cannot have it both ways. By taking the position that the April 29, 1971 letter was issued by the ASME in the normal course of its standard-setting activities, the ASME has provided important support for the jury's verdict that "the ASME" was responsible for the injury to Hydrolevel.

The ASME relentlessly exploits one word from the opinion of the Court of Appeals to create the diversionary argument that one cannot be an "unintentional" conspirator and that the ASME was improperly found to be a participant in the conspiracy "on a theory of negligence." This straw man is then repeatedly demolished. The fact remains, however, that on a

substantial record, and pursuant to a charge that the ASME declared to be "satisfactory," the jury found that the ASME's agents had the very knowledge and intent which the ASME now claims to have been lacking. The "negligence" argument is simply an attempt to blur the distinction between the elements required for a combination or conspiracy in restraint of trade, which require "knowing" participation by a human being, and the elements needed to hold the human being's corporate principal responsible for that participation, a totally different concept which has never required that the principal expressly or knowingly authorized the unlawful act.

The ASME's liability for the damage caused to Hydrolevel can be justified under any one of several traditional agency law principles. First, because the critical April 29, 1971 letter was a product of the authorized code-development activity of Hardin, James and Hoyt, and was not necessarily adverse to the interests of the ASME, the conduct in question was within the scope of the actual authority of these men and the ASME is liable on traditional grounds of *respondeat superior*. This case bears no similarity to the cases cited by the ASME where the agent is stealing from, or defrauding, the corporate principal and where the courts have therefore refused to impute the dishonest agent's specific criminal intent to the victimized corporate principal. The ASME obtained considerable financial benefit from the code-developing work of its agents and the issuance of the April 29, 1971 letter was not inconsistent with that interest. Second, the ASME's internal conduct and public posturing after learning of the April 29, 1971 letter and its devastating effect upon Hydrolevel constituted a ratification and an affirmance of the letter and the combination that created it. The June 9, 1972 letter to Hydrolevel, far from being a "retraction" of the first letter, expressly "confirmed" it. Third, as the Court of Appeals correctly found, the traditional rules of agency bind a principal to the acts of another, even in the absence of actual authority or ratification, where the principal has led a third party to believe that an apparent agent had the authority to speak or act on the principal's behalf and that third party relied upon the agent's apparent authority. All of these circumstances are admittedly present in this case.

It is not unfair to apply each of these traditional principles of agency law to the ASME in this case; to do so is consistent with every prior decision of this Court involving the vicarious liability of corporate principals for the torts of their agents and there is no reason why a different set of rules should apply to antitrust conspiracy cases. Indeed, as pointed out by the Court of Appeals, it is essential that organizations such as the ASME, which have assumed the unsupervised power to regulate an important part of this nation's economy through the setting of industrial standards, be held responsible under the antitrust laws for the operation of those programs. The ASME has an inherent duty that those programs operate fairly and objectively, a duty the ASME has ignored in practice just as it is ignored in its Brief. By the ASME's own definition, nothing done in the name of a non-profit organization is ever "intended to benefit" that organization and the adoption of the rule proposed by the ASME would, in effect, insulate all such organizations from antitrust liability for the acts of its agents. The law of agency is grounded upon the concept that the principal must be held responsible for the acts of his agents or there will be no incentive for principals to select and supervise their agents with care. If that concept is important in everyday commercial dealings between citizens, it is much more important where the public's interest in a free economy is at stake.

ARGUMENT

I. INTRODUCTION

The ASME asks this Court to declare that non-profit corporations are not responsible under the doctrine of *respondeat superior* for the anticompetitive acts of their agents unless those acts are specifically intended to confer some "benefit" upon the corporate principal. This is, of course, precisely the instruction given to the jury at the request of the ASME. Although the Court of Appeals found that instruction to be "more favorable" to the ASME "than the law required," the

jury found against the ASME under the very legal principle that the ASME is now asking this Court to establish. Whether the Court of Appeals was correct in applying the "less favorable" standard of *respondeat superior, i.e.*, the doctrine of "apparent authority," to this case becomes an issue only if it is concluded that the factual record before the jury could not support the verdict against the ASME on the basis of the charge given, a charge that the ASME both requested and declared "satisfactory" after it was delivered.[21]

It is well settled that jury verdicts based upon proper instructions are not to be disturbed unless "without support in the evidence." *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944). "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Id.* at 35. To do so would deprive the parties of the right to trial by jury. *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 358-59 (1962).

Moreover, the jury in this case, as in other cases, was entitled to view the evidence of the ASME's conduct *as a whole*, from March of 1971 through the trial, in order to draw the necessary inferences with respect to unlawful purpose, anticompetitive effect, scope of authority (including "intent to benefit") and ratification. The defendant's conduct cannot be "compartmentalized" or "dismembered" and then scrutinized on a piecemeal basis, as the ASME Brief now urges by examining each of the events from March of 1971 until June of 1972 separately for indicia of "ASME intent" and then wiping the slate clean. *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 699 (1962); *United States v. Patten*, 226 U.S. 525, 544 (1913). It is indicative of the ASME's improper approach that its Brief to this Court fails even to mention the

[21] The ASME cannot challenge the instructions of the district court on this appeal for two reasons. First, the ASME did not object to those instructions. Fed. R. Civ. P. 51. Second, if the district court's charge (including the charge on "apparent authority") was indeed in error, we submit that it was an "invited error" which cannot now be attacked. *Maxwell Land Grant Co. v. Dawson*, 151 U.S. 586, 606 (1894); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2558 at 675 (1971).

evidence in the record as to the events which followed the June 9, 1972 ASME letter to Hydrolevel. The ASME did not object to this evidence at trial and the district court found it particularly persuasive on the issue of ratification. App. 756-61; J.A. 34-35, 39-40.

Viewed as a continuum of behavior, even if contrary inferences might reasonably have been drawn, the record overwhelmingly supports the jury's verdict that each individual element of the district court's instruction on liability was satisfied and that "the ASME," through its agents, knowingly engaged in a combination or conspiracy to restrain and to monopolize trade. As Judge Weinstein observed, this was a "nicely balanced jury case" (App. 996) and the verdict of the jury on liability or on damages should not be overturned unless there is no support in the record for that verdict.

II. THE ASME WAS PROPERLY FOUND LIABLE UNDER THE SHERMAN ACT FOR THE ANTICOMPETITIVE CONDUCT OF ITS AGENTS

Although the ASME Brief repeatedly seeks to belittle the conspiracy that is at the heart of this case ("this curious conspiracy," ASME Br. 21), it never directly questions the appropriateness of the jury's verdict: a combination for the purpose of issuing an ASME letter capable of foreclosing Hydrolevel from the market did exist and such a letter was actually issued with the intended effect. The ASME also does not dispute that such a concerted market foreclosure violates both Sections 1 and 2 of the Sherman Act, but suggests that it is unprecedented to find unlawful a conspiracy that does not have as an objective a positive economic "benefit" for all of the participants. This suggestion simply ignores the entire history of the antitrust laws.

This Court has expressly held that it is not necessary that an agreement be intended to "benefit" all of the participants before it may be considered to be a combination in violation of the Sherman Act. *Albrecht v. The Herald Co.*, 390 U.S. 145, 152 n.8 (1968). As that case demonstrates, a conspiracy in restraint of trade may actually operate to the financial *disadvantage* of one or more members of a conspiracy without

exempting those members from the full legal consequences of their acts. A combination or conspiracy which violates the Sherman Act may not even be the result of a strictly economic decision at all, but may be motivated by a genuine concern to prevent unfair trade practices, *Fashion Originators' Guild v. F.T.C.*, 312 U.S. 457 (1941), or a desire to promote public safety and protect professional ethical standards, *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), or simply the result of a personal feud. *Klor's Inc. v. Broadway-Hale Stores Inc.*, 359 U.S. 207, 210 (1959). If it has the forbidden effect it is unlawful nevertheless.

"[A]ny concerted action . . . to cause, or which in fact does cause, . . . restraint of competition . . . is unlawful." *American Column & Lumber Co. v. United States*, 257 U.S. 377, 400 (1921). The general rule is that proof of *either* an unlawful purpose *or* an anticompetitive effect subjects all of the participants in a concerted action to civil antitrust liability. *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13, 446 n.22 (1978). In this case both unlawful purpose and anticompetitive effect are clearly demonstrated. Moreover, the participants are "held to have intended the necessary and direct consequences of their acts, and cannot be heard to say the contrary." *United States v. Patten*, 226 U.S. at 543.

Seizing upon the passing remark of the Court of Appeals that "the ASME" was an "unintentional participant" in the scheme, the ASME has constructed an elaborate diversionary argument: *viz.*, that because one cannot be an "unwitting" conspirator, the ASME has actually been exonerated and the complaint should be dismissed. This argument, of course, assumes the very conclusion that is being urged upon this Court, *i.e.*, that the ASME should not be held responsible for the acts (and therefore the presumed intent) of its agents and ignores the obvious fact that corporations, unlike human principals, can harbor no intent and can perform no acts, *except* through their agents. It is meaningless to speak of the "intent" or "knowledge" of "the ASME," or the lack thereof, as being divorced from the "intent" and "knowledge" of the very agents

expressly delegated to do its most important and most remunerative work, the development and interpretation of its codes.

The "unintentional participant" remark of the Court of Appeals panel is inconsistent with the entire body of agency law that holds a principal liable for acts of his agents, even when those acts were directly contrary to the principal's instructions (and thus were "unintentional" as far as the principal was concerned). Moreover, the "unintentional participant" comment, from which the ASME draws so much comfort, ignores the charge of the district court and the verdict of the jury rendered pursuant to that charge. Judge Weinstein repeatedly instructed the jury that there had to be a "knowing" and "intentional" commitment to a common end, that there could be no such thing as an "unwitting" conspirator, and that "indifference," "recklessness," "gross negligence" or "stupidity" could not be "a substitute for willful joining of the conspiracy." J.A. 45-46, 52. The jury found that "the ASME" was such a conspirator, *based upon the acts of its agents.*

Thus, the ASME's claim that it was found liable by the Court of Appeals on a "theory of negligence" deliberately obscures the distinction between an issue conceded by the ASME and not before this Court (whether Hardin, James and Hoyt joined in a combination in restraint of trade, which the jury clearly found to have been "willful," "knowing" and not "negligent") and the separate issue of whether the ASME, as a corporate principal, should bear the responsibility for those acts. It is only the second issue that concerns us here and the result does not turn on "willfulness." Rather, it involves a traditional examination of the relationships among the principal, the purported agents (and the nature of their acts), the victim and the public.

It has long been recognized that the imputation of an agent's conduct and knowledge to the principal is a fiction, a fiction that is compounded when the principal is a corporation

that cannot act or think other than through its agents.[22] In such circumstances, fundamental fairness requires that the principal, who expands his power and ability to act by utilizing the services of others, accept responsibility for his agent's improper conduct just as he accepts the benefit of the agent's proper conduct. *Gilmore v. Constitution Life Insurance Co.*, 502 F.2d 1344, 1348 (10th Cir. 1974).

The agency rules governing the imputation of the conduct and the knowledge of an agent to his principal are well-established. A principal is liable to an injured third person for the acts of an agent if the agent was (a) authorized, (b) apparently authorized, or (c) had an inherent power to bind the principal arising from the agency relationship. *Restatement (Second) of Agency* § 140 (1959)(hereinafter "*Restatement*"). The liability of the principal may be based upon two, or even all three, of these grounds. *Restatement* § 140, Comment *a.* Under a fourth ground, a principal may be held liable for conduct that was unauthorized if he ratifies or affirms that conduct after notice. *Restatement* § 82-99, 143. It is important to note that *only* the first of these four grounds for a principal's liability involves a consideration of whether the agent intended to serve his principal's interests in performing the acts in question. In this case, the record supports a finding of liability against the ASME under *all four* of the grounds set forth above.

A. The Conduct of Hardin, James and Hoyt Was Within The Scope Of Their Actual Authority

When an agent or employee is engaged in activity which has been delegated to him by his principal, even though his primary purpose is to benefit himself or another by that activity, the principal has traditionally been held responsible for the consequences because such activity is performed "within the

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[22] "Endowing a corporation with a fictitious 'personality,' so that, for example, it has 'knowledge,' is a useful device for the analysis of many problems. But it can also constitute a trap for the unwary when they ascribe reality to the fictions." *Schoenbaum v. Firstbrook*, 405 F.2d 200, 215 (2d Cir. 1968)(Hays, J. concurring in part and dissenting in part), *rev'd en banc*, 405 F.2d 215 (2d Cir.)(Opinion by Hays, J.), *cert. denied*, 395 U.S. 906 (1969).

scope" of the agent's delegated authority. *Restatement* § 236. As long as the activity of the agent was of the general type as his authorized activity or "sufficiently similar" to authorized activity, and was performed *at least in part* on behalf of the principal, the principal is liable even when the agent's specific acts were directly contrary to the principal's express instructions, and even when those acts were criminal in nature. *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481 (1909); *Lewis v. Walston & Co., Inc.*, 487 F.2d 617 (5th Cir. 1973).

In cases where only the agent's *conduct* is in question (because the general intent to achieve the results of that conduct is presumed), the analysis is relatively uncomplicated. The finder of fact evaluates the evidence and determines whether the conduct was actuated "to any appreciable extent" by a purpose to serve the master or principal. If so, the conduct is considered to be within the scope of the agent's or servant's authorized activity. *Restatement* §§ 228-236. *See also* Comment *b* to § 236. According to these well-established rules, an agent or servant may indeed "serve two masters" and can bind *both* masters or principals by his conduct, as long as both are "interested in the performance of the same act" and the conduct is not necessarily adverse to the interests of either. *Restatement* §§ 226, 235 and 236.[23]

However, where the "intent" or "knowledge" of the principal is a separate and distinct element of the principal's liability, as in criminal cases where specific intent is required, courts have been careful not to impute such intent to a principal simply because the physical conduct of the agent may have been within the scope of the agent's authorized duties. In such cases, the knowledge or intent of the agent must not have been "adverse" to the principal's interests for it to be imputed to the

[23] It ill becomes the ASME piously to incant the biblical "adage" about man's inability to serve both God (presumably the ASME) and Mammon (presumably M&M)(ASME Br. 34), when the ASME had, for 23 years, demanded just such service from John James.

principal. Section 282 of the *Restatement* sets out the rule as follows:

> A principal is not affected by the knowledge of an agent in a transaction in which the agent secretly is acting adversely to the principal and entirely for his own or another's purpose, except . . . if the failure of the agent . . . to reveal the information results in a violation of a . . . relational duty of the principal to a person harmed thereby. . . .

In order to bring itself within this rule, as it apparently seeks to do, the ASME must establish both that the issuance of the April 29, 1971 letter was an act "adverse" to the interests of the ASME, *and* that the ASME had no "relational duty" to Hydrolevel. The ASME cannot satisfy either of these propositions and, significantly, neither proposition was the subject of any proof, or even argument, by the ASME at trial.

All of the cases cited by the ASME in its attempt to establish that an "intent to benefit" the principal is a required element of a principal's liability are nothing more than applications of the rule set forth in § 282. For example, in *Standard Oil Co. v. United States,* 307 F.2d 120 (5th Cir. 1962), a case heavily relied upon by the ASME, the issue was whether the specific criminal intent of certain employees could be imputed to the corporate employer in order to find the employer guilty of a "knowing" violation of the law. Employees of the defendant corporations participated in a scheme to steal oil from their employers and to falsify the necessary records in order to assist a third party's criminal enterprise. One of the corporate employers reported the matter to the authorities immediately after learning of the scheme (an attitude that is to be contrasted with that of the ASME in this case) and one can only imagine the companies' consternation when the government filed criminal charges against the *corporations* for "knowingly" violating a federal law forbidding interstate transportation of "hot" oil. Not surprisingly, the Court of Appeals found that stealing from one's employer is "adverse" to the employer's interests and therefore refused to impute the employees' specific criminal intent to the corporate defendants

despite the fact that the employees' physical activity in carrying out the theft was encompassed within their "regular functions."[24]

We see nothing in the *Standard Oil* opinion which helps the ASME in this case. It is one thing to refuse to impute the criminal's specific intent to the victim, just because of an agency relationship, and quite another to refuse to hold the corporate employer responsible to an injured or defrauded third party for the unlawful acts of his agents when those acts are part of the regular, normal "functions" of the agent. Moreover, when the corporate principal owed an obligation or duty to the injured third party which was violated by that conduct, the principal cannot avoid liability even when the agent was secretly acting solely for his own purposes. *See Restatement* § 282.

Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968), and the quotation from the panel majority opinion at page 26 of the ASME's Brief, is consistent with this rule, even though that opinion was *reversed* by the Second Circuit Court of Appeals sitting *en banc*, *Schoenbaum v. Firstbrook*, 405 F.2d 215 (2d Cir.), *cert. denied*, 395 U.S. 906 (1969), which the

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[24] To the same effect is *United States v. Ridglea State Bank*, 357 F.2d 495, 499 (5th Cir. 1966), discussed at length in the ASME's Brief at pp. 31-33. None of the cases cited in the footnote on page 26 of the ASME Brief stand for the proposition for which they are cited, *i.e.*, that an agent acting solely for himself can never bind a principal, and some are authority for the contrary rule. For example, the ASME quotes the following portion of a sentence from *Moscarelli v. Stamm*, 288 F. Supp. 453, 461 (E.D.N.Y. 1968): "It is axiomatic that conduct of an employee not for the purpose of serving the master is not within the scope of his employment (Restatement (Second), Agency, § 235 (1958). . . .)" What has been surgically ellipsized, however, expressly accepts apparent authority as a basis for liability under *Restatement* § 219(2)(d), which provides for liability to attach to the principal where the agent acts *"solely"* for his own purposes. *See* Comment *e* to § 219. We would argue that the *Moscarelli* opinion actually rejects the fundamental point being argued by the ASME in this appeal.

The ASME's citation of *United States v. Beusch*, 596 F.2d 871, 877 (9th Cir. 1979) is even more puzzling. There the corporate principal was convicted of a "willful" violation of a criminal statute over an argument that the agent had no "intent to benefit" the principal and where the charge given to the jury by the trial court was indistinguishable from that given in the instant case at the ASME's request. The conviction in *Beusch* was affirmed.

ASME Brief fails to note. That case involved allegations that corporate directors conspired to sell treasury stock for a price far below its true value. The Court, sitting *en banc*, refused to impute the directors' knowledge to the corporation, a result entirely consistent with *Restatement* § 282 and the *Standard Oil* case. There was far less, if any, "conflict" between the interests of the ASME and those of Hardin, James and Hoyt in issuing the April 29, 1971 letter than there is between a corporation and the directors who are giving away its stock, and we submit that the *Schoenbaum* case, and the general rule quoted from it by the ASME, supports Hydrolevel's position in this case.[25]

The ASME fails to explain how the facts of this case fit within that general rule. How does the ASME claim that the issuance of the April 29, 1971 letter, or even the interests of Hardin, James and Hoyt in issuing it, were "adverse" to its own interests? Apparently the letter was "adverse" to the ASME's interests only because this litigation ensued, surely not the type of adversity that would permit a principal to escape liability.[26]

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[25] The other cases cited at pages 24-25 of the ASME Brief are merely applications of the general agency rule that even the acts of "disloyal," "dishonest" or "disobedient" agents are imputed to the principal where the agents intended their unlawful acts to profit their corporate employers. *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1090 (5th Cir.), *cert. denied*, 437 U.S. 903 (1978). These unremarkable decisions do not stand for the *reverse* of that proposition, however, as the ASME implies, *viz*, that where there is no such intent there can be no corporate liability. "[B]enefit, at best, is an evidential, not an operative, fact." *Old Monastery Co. v. United States*, 147 F.2d 905, 908 (4th Cir.), *cert. denied*, 326 U.S. 734 (1945). Where the illegal activities "were carried on as an incident to the carrying on of the corporation's business and were made possible only through the corporate authority with which [the agent] was clothed . . .," a corporate defendant may be found to be criminally liable for the agent's conduct. *United States v. Empire Packing Co.*, 174 F.2d 16, 20 (7th Cir.), *cert. denied*, 337 U.S. 959 (1949). The conduct of Hardin, James and Hoyt fits precisely within this language.

[26] "Presumably no tortious act by an agent redounds to the benefit of the principal where the latter is held responsible for the damage which results." *J.C.B. Super Markets, Inc. v. United States*, 530 F.2d 1119, 1122 (2d Cir. 1976).

It is possible the jury was convinced that Hardin and Hoyt were motivated solely by a desire to help John James, an old friend and longtime ASME colleague who had devoted many years of "free" service to the ASME. As we shall develop in Part III A, *infra*, such a motive would be fully consistent with the ASME's traditional interests. It is also possible that the jury felt that Hardin and Hoyt believed that the ASME's interests lay in keeping the new and unproven Hydrolevel probe off the market and in preserving the market for products that operate on the well-known "float" principle. The ASME has simply pointed to no fact in the record consistent with its often repeated claim that the issuance of the April 29, 1971 letter and its subsequent use was adverse to the interests of the ASME.

Even assuming that the issuance of the letter by Hardin and Hoyt was intended solely to help M&M protect its monopoly and was arguably adverse to some interest of the ASME, the ASME would still have to show that the conduct of Hardin and Hoyt did not violate any duty which the ASME had to Hydrolevel in order to come within the terms of the exculpatory principle set forth in § 282 of the *Restatement*. As we explain more fully below, the ASME unquestionably had a duty to the industry which it had appointed itself to regulate, and to Hydrolevel as a part of that industry. This is a subject that is understandably ignored throughout the ASME Brief.

In this case, there is abundant evidence that the acts of Hardin, James and Hoyt were authorized or sufficiently similar to authorized acts that they could reasonably be considered by the jury to have been performed on behalf of the ASME. First, there are formal (and we submit conclusive) admissions of that fact by the ASME. The ASME's Answer to the Amended Complaint expressly admits that "[i]n its letter dated April 29, 1971 . . . *ASME responded* to an inquiry from one of its members . . . ." J.A. 30 (emphasis added). The ASME Answer continues that "[t]he statements contained in the letter of April 29, 1971 . . . *were made by ASME . . . in furtherance of ASME's legitimate interests in the promulgation of safety standards for boilers.*" J.A. 31 (emphasis added). Second, the evidence was undisputed that Hardin and Hoyt had express written authority from the ASME to draft and issue interpretive letters like the

April 29, 1971 letter. (J.A. 120; AX V. 174, 179-81). Third, the ASME's trial counsel repeatedly told the jury that the April 29, 1971 letter was issued *by the ASME* and pursuant to the ASME's efforts to "serve the public." App. 149-50, 1096, 1103-04, 1109, 1114. Judicial admissions, including admissions of counsel during trial, are, of course, binding, even on appeal. *Glick v. White Motor Co.*, 458 F.2d 1287, 1291 (3d Cir. 1972); *State Farm Mutual Automobile Insurance Co. v. Worthington*, 405 F.2d 683, 686 (8th Cir. 1968).

Finally, the evidence relating to the ASME's subsequent behavior also overwhelmingly supports the conclusion that the April 29, 1971 letter was written and issued "on behalf of" the ASME. The entire series of events surrounding the June 9, 1972 letter justified a finding by the jury that, at the time the first letter was issued, it was on behalf of and for the benefit of the ASME and pursuant to its standard procedures. Indeed, the 1974 resolution of the Professional Practice Committee expressly stated that Hardin, James and Hoyt were acting "in the line of duty" by issuing the first letter and self-righteously took the *Wall Street Journal* to task for having the temerity to imply the contrary. *Even ASME's Brief in this Court* repeats the admission that the April 29 letter was "routinely" issued by the ASME in accordance with its "standard procedures" (ASME Br. 8) and that it was an "accurate response to the question presented." ASME Br. 37 n.*.

In the face of this record the ASME should not now be permitted to dispute that the April 29, 1971 letter was prepared and issued on behalf of and for the benefit of the ASME. This is not a case where a defendant forthrightly denies from the outset that a purported agent was acting on its behalf with respect to the injurious act. We have here a defendant that throughout this litigation has sought to vindicate its agents, as well as itself, by taking inconsistent factual positions: *viz.*, by arguing on the one hand that the acts in question were authorized (because they were innocent) and on the other hand that they were not authorized (because they were not innocent). A litigant which asserts such contradictory positions cannot be heard to complain if the jury selects only half of each

factual proposition and concludes that the acts were authorized (and were not innocent).[27]

B. The ASME Ratified And Affirmed The Anticompetitive Conduct

Assuming, *arguendo*, that Hardin, James and Hoyt had not acted within the scope of their authorized ASME duties in issuing the April 29, 1971 letter, the ASME nevertheless clearly ratified and adopted it as its own. The district court expressly instructed that, in considering whether the ASME ratified or adopted the acts of Hardin, James and Hoyt, the jury could take into account the ASME's "action or failure to act, when the actions of the individual staff or committee members came to wider attention within the defendant." J.A. 52. Judge Weinstein felt that the evidence of ratification was particularly strong. App. 593-594.

Under well-accepted principles, ratification may be manifested in many ways, *e.g.*, by a verbal statement, a writing, "or by doing nothing after learning of the unauthorized act." W. Seavey, *Handbook of the Law of Agency* § 37 at p. 67 (1964) (hereinafter "Seavy, *Agency*").

> [Proof of ratification] may consist merely of inaction. This is sufficient to indicate affirmance if, after learning that an unauthorized act was done on his account, the purported principal gave no indication of protest or disagreement, as a normal person in his position would have done. This failure to take action is evidence of a willingness to become a party to the transaction.

Id. (footnote omitted). Whether the ASME, by its acts or failure to act after notice, endorsed or adopted the April 29, 1971 letter was properly a jury question. It is instructive that

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[27] We respectfully suggest that the doctrine of judicial estoppel is appropriate in this case. "A party to litigation will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same matter in the same or a successive series of suits." II *Freeman on Judgments* § 631 (5th ed. 1925), as quoted in *Scarano v. Central R.R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953). "Such use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil the courts should not tolerate." *Id.*

the ASME Brief devotes only four sentences to this issue and relies exclusively upon the "finding" of the Court of Appeals that the June 9, 1972 letter was a "retraction" of the earlier letter to support its argument. ASME Br. 42.

In addition to the evidence described above, relating to the ASME's formal admissions and presentations of evidence at trial (all of which would support a ratification theory as well as an actual authority theory), the ASME's entire course of conduct, after Mr. Rymer's March 23, 1972 letter gave it notice of the damage being done to Hydrolevel (ASME Br. 9-10), strongly supports a finding of ratification. The June 9, 1972 letter itself, which the Court of Appeals denominated a "retraction" in order to allow the ASME to escape having to pay for the damage caused to Hydrolevel, was, in fact, exactly the opposite. It was vague and ambiguous, "confirmed the intent" of the *entire* earlier letter and closed with cautionary language written by James as a "limitation" on the acceptability of time-delays under the Code. In Judge Weinstein's words, it was "not a forthright . . . letter correcting [the] previous letter that was now being circulated by a competitor." J.A. 40. Indeed, how can anyone argue that the April 29, 1971 letter was "retracted" when the ASME is still representing that it was "accurate"? ASME Br. 37 n.*.

The ASME's continuing refusal to initiate a meaningful internal investigation of the actions of Hardin, James and Hoyt, or to discipline them, and the incredibly arrogant resolution of the Professional Practice Committee *commending* their actions as being "in the line of duty" further supports a finding that the ASME ratified the conduct in question.

> The retention in employment of a servant who has committed a tort not in the scope of employment is frequently urged as a ratification of the tortious conduct and a number of courts have held that this fact alone is prima facie an affirmance. Other courts require corroborative evidence. *If there is active assistance to the cause of the employee or commendation of his conduct, all courts find affirmance.*

Seavy, *Agency* § 37 at p. 69 (footnotes omitted)(emphasis added).

C. The ASME Is Responsible for the Acts of Its Agents Performed within Their Apparent Authority

The Court of Appeals found it unnecessary to examine the record support for the verdict of the jury under the "actual authority" or "ratification" instructions because it found that the ASME's liability was clearly established under the less stringent concept of "apparent authority." As is pointed out in Comment *f* to § 8 of the *Restatement*, "the term 'apparent authority' has been broadly used by the courts to describe the power which agents have in creating liability against their principals, although without authority." According to the *Restatement*, true "apparent authority" is found only where a manifestation by the principal to a third party has caused that third party reasonably to believe that the apparent agent has the power to act on behalf of the principal, and the third party relies upon that manifestation. It differs from the creation of actual authority, which is based upon a delegation or grant to the agent himself, and is simply a different formulation of the same "business equity" that is the basis for agency law in general. *See Restatement* § 8, Comments *a, b, c, f.*[28]

As pointed out by the Court of Appeals, the ASME gave these men control of the code-developing machinery needed to accomplish their anticompetitive purposes and held them out to the world as being able to speak authoritatively on behalf of the ASME in such matters. By issuing interpretations of the ASME Code according to standard ASME procedures on ASME letterhead and over the signature of a full-time ASME staff officer, they bound the ASME regardless of their true purposes

[28] A similar concept is "inherent agency power," which is based solely upon the relationship between the principal and the agent without the need for any manifestations to a third party. *Restatement* § 8 A. Inherent agency power results in the principal's liability when the "agent acts purely for his own purposes in entering into a transaction which would be authorized if actuated by a proper motive." *Restatement* § 8 A, Comment *b. See also Restatement* §§ 165, 262. The "inherent agency power" basis for liability is even more appropriately applied to this case than the concept of "apparent authority," and, as indicated by the *Restatement*, both may be found in the same fact situation.

or underlying motives. This is the clear impact of the principles described by §§ 219, 247-49, 257-65 of the *Restatement.*[29]

Relying almost exclusively on a passage found in this Court's opinion in *United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344 (1922), the ASME asserts that the doctrine of "apparent authority" has been "expressly rejected . . . as a basis for holding a voluntary organization liable under the antitrust laws for an agent's acts." ASME Br. 17-18. To the contrary, that opinion never addressed the question which the ASME now grandly claims it "expressly rejected." In *Coronado* this Court reviewed an antitrust judgment against the United Mine Workers of America for a strike by one of its local unions. The plaintiff argued that the international union had given the local union actual authority for the strike, or had ratified it, thus assuming responsibility. On the basis of the international union's constitution and other facts in that case, this Court found that no actual authority or ratification existed. The Court expressly noted that the case did *not* involve the "holding out [of] an appearance of authority on which some third person acts," 259 U.S. at 395, and then found the international union not liable for the local strike. By going out of its way to assert the *absence* of apparent authority, the Court clearly implied

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[29] The fact that those who relied on the "appearance" of agency were not those who were injured, as argued in the ASME Brief, is clearly irrelevant. *See Restatement* § 265, Comment *a.* As both § 8 and § 265 and the comments to these sections make clear, as long as *someone* relied on the manifestation of "apparent authority," the principal is bound. Not one of the cases or provisions cited by the ASME supports the statement in the ASME Brief (at p. 29) that "[a] crucial element has been that *plaintiff himself relied* upon the manifestation of authority given by the defendant" (emphasis added). The quotation from Seavey, *Agency* at p. 29 of the ASME Brief is particularly abused and confuses the concept of apparent authority with that of estoppel. Seavey *never said* that "apparent authority as a basis for liability is available 'only to those by whom the misleading manifestations [of authority] are received.'" ASME Br. at 29, purporting to paraphase Seavey, *Agency* § 8, at p. 14. Indeed, on the page before that cited, Seavey indicates that as long as the manifestation "led others, including the plaintiff, to believe that the agent had the authority . . .," the doctrine is applicable. § 8, at p. 13. The reliance of those "others," the potential customers for Hydrolevel's product, on Hoyt's authority to issue interpretative letters is precisely what destroyed Hydrolevel and prompted this lawsuit.

that the result would have been different had it been present. This analysis of *Coronado* is confirmed by the decision of a unanimous panel of the United States Court of Appeals for the District of Columbia Circuit in *Mile Branch Coal Co. v. United Mine Workers of America*, 266 F.2d 919, 922 (D.C. Cir. 1959). For the ASME to claim that the *Coronado* case "expressly rejected" the use of an "apparent authority" doctrine in antitrust cases is plainly unfounded.[30]

Contrary to the ASME's contention, there is nothing to indicate that the entire range of agency law principles, including those of "apparent authority" and "inherent agency power," do not apply in all substantive legal fields. In *Gleason v. Seaboard Air Line Railway Co.*, 278 U.S. 349 (1929), the principal case relied on by the Court of Appeals below, this Court adopted the concept of apparent authority as a basis for the liability of a principal in the federal courts, expressly overruling a previous decision that had held to the contrary, *viz., Friedlander v. Texas & Pacific Railway Co.*, 130 U.S. 416 (1889). "[F]ew doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own." *Gleason v. Seaboard Air Line Railway Co.*, 278 U.S. at 356. That has been the law in the federal courts ever since. *See Ricketts v. Pennsylvania Railroad Co.*, 153 F.2d 757, 759 (2d Cir. 1946)(Opinion of Learned Hand, J.).

Gleason has been followed by many other federal court decisions applying the "apparent authority" concept to find principals liable in a wide variety of federal regulatory and common law causes of action. Nowhere in those cases, or in any of the cases cited by the ASME (with the exception of the dictum in *Truck Drivers, supra* n.30) is there any indication that the entire body of agency law, including "apparent authority,"

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[30] The only case cited by the ASME containing any language that would support the ASME's strained reading of *Coronado* is *Truck Drivers' Local No. 421 v. United States*, 128 F.2d 227, 235 (8th Cir. 1942). Like *Coronado*, that case involved only allegations of actual authority and ratification. It did not directly address the issue for which the ASME cites it, although in one passage of dictum the Court does read *Coronado* in the same manner the ASME is now urging on this Court.

is not applicable to antitrust cases or to any other specific type of tort or other violation of a legal obligation.[31]

In *S.E.C. v. First Securities Co.*, 463 F.2d 981, 985 (7th Cir.), *cert. denied*, 409 U.S. 880 (1972), the Court applied §§ 261 and 262 of the *Restatement* to hold a corporate principal liable under the federal securities laws for a "secret" fraudulent scheme perpetrated by an apparent agent of the corporation purely for his own benefit. The same result, based on the same reasoning, is found in *Kerbs v. Fall River Industries, Inc.*, 502 F.2d 731, 741 (10th Cir. 1974), and *Henderson v. Croom*, 403 F. Supp. 668 (N.D. Ala. 1975), also federal securities law cases. *Sennott v. Rodman & Renshaw*, 474 F.2d 32 (7th Cir.), *cert. denied*, 414 U.S. 926 (1973), a securities case relied upon by the ASME for its "reliance" argument (*see* footnote 29 *supra*) is interesting for several reasons. First, even though the principal in that case was found not to be liable (on the ground that *nobody* relied upon the apparent authority of the agent to act for the principal), the case clearly applied the apparent authority doctrine and simply found that the necessary facts were not present. This surely does not support the expansive

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[31] *Dark v. United States*, 641 F.2d 805, 808 (9th Cir. 1981); *In re F. W. Koenecke & Sons, Inc.*, 605 F.2d 310, 312-13 (7th Cir. 1979); *National Acceptance Co. of America, v. Coal Producers Ass'n Inc.*, 604 F.2d 540 (7th Cir. 1979); *United States v. Sanchez*, 521 F.2d 244, 246 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976); *Gilmore v. Constitution Life Ins. Co., supra; Thomas v. Colorado Trust Deed Funds, Inc.*, 366 F.2d 140, 143 (10th Cir. 1966); *Employers' Liab. Assurance Corp. v. L. J. Marcotte Ins. Agency*, 314 F.2d 470, 476-78 (8th Cir. 1963); *Bowman v. Home Life Ins. Co. of America*, 243 F.2d 331, 335 (3rd Cir. 1957); *Izard v. Arndt*, 483 F. Supp. 261, 263 (E.D. Wis. 1980); *Ira S. Bushey & Sons, Inc. v. United States*, 276 F. Supp. 518, 527-30 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 167 (2d Cir. 1968). When Congress discerned a need to create a separate standard for secondary liability in connection with a federal cause of action it has not hesitated to do so. Section 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78t(a), sets forth such a standard of liability for "controlling persons" under that Act and whether the common law of *respondeat superior* is still applicable in cases brought under that Act is an open question in this Court. *See Sharp v. Coopers & Lybrand*, ____F.2d____, [1981] Fed. Sec. L. Rep. (CCH) ¶97,971 (3d Cir. 1981), *petition for cert. filed* (Sept. 2, 1981); *Marbury Management, Inc. v. Kohn*, 629 F.2d 705 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3409 (1980). Because of this dual standard of secondary liability the federal securities cases on this issue must be read with care.

claim of the ASME that liability based upon "apparent authority" is unavailable in the federal courts. Second, the case is interesting because in their dissent from this Court's denial of *certiorari*, two Justices wrote:

> [L]iability cannot be confined to those formally authorized to act in the firm's behalf, for such a rule would constrict the common law principles of apparent authority, a construction inconsistent with the broad remedial purpose of the legislation. The purpose of the [Securities Exchange Act of 1934] is to expand, not restrict, the public's remedies.

Sennott v. Rodman & Renshaw, 414 U.S. 926 (1973) (Justices Douglas and Blackmun dissenting from denial of *certiorari*).

The Sherman Act and the Clayton Act, no less than the Securities Exchange Act of 1934, are remedial in nature and intended to expand, not restrict, the public's remedies. In *Continental Baking Co. v. United States*, 281 F.2d 137, 150-51 (6th Cir. 1960), an "apparent authority" instruction to the jury in a criminal antitrust action was held to be an "appropriate expression in simple terms of a difficult legal concept." The instruction in that case was virtually identical to the charge in the instant case except, of course, that "intent to benefit" was not required. Similarly, in *United States v. Continental Group, Inc.*, 603 F.2d 444, 468 n.5 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980), the Third Circuit Court of Appeals approved a criminal antitrust jury instruction on "apparent authority" which also was virtually identical to the charge in the instant case (but again without the requirement of an "intent to benefit"). Trial Tr. at Vol. 35, pp. 11-12, *United States v. Continental Group, Inc.*, Civ. Nos. 76-514, 76-524 (E.D.Pa. 1978).[32] The anticompetitive acts of an apparent agent were sufficient to bind the principal in *Azalea Drive-In Theatre, Inc. v. Sargoy*, 394 F. Supp. 568, 573, 577 (E.D. Va. 1975), *rev'd on other grounds*, 540 F.2d 713 (4th Cir. 1976), and in *Adams-*

[32] Standard jury instructions on "apparent authority" are also carried in the American Bar Association Antitrust Section's twin volumes *Jury Instructions in Criminal Antitrust Cases 1964-1976*, 79-90 (1978) and *Antitrust Civil Jury Instructions (1980)*, 18-21.

Mitchell Co. v. Cambridge Distributing Co., 189 F.2d 913, 917 (2d Cir. 1951), both civil antitrust suits. In a case involving a state treble damage antitrust statute, *Carl Wagner & Sons v. Appendagez, Inc.*, 485 F. Supp. 762, 770 (S.D.N.Y. 1980), defendants were held liable for acts of an apparent agent. The Second Circuit's opinion in the case at bar was cited with approval by the United States Court of Appeals for the District of Columbia Circuit in *Federal Prescription Service, Inc. v. American Pharmaceutical Association*, ___ F.2d ___, [1981-82] Trade Cases (CCH) ¶ 64,217 at p. 73,847 n.13 (D.C. Cir. 1981), another antitrust case. Except for the fact that the ASME is a non-profit corporation, there is nothing to distinguish this case from any of the authorities cited.[33]

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[33] The ASME Brief repeatedly argues that the apparent authority concept has been applied most often in actual damage cases, which is true, and that there is a conceptual barrier to applying it in punitive or treble-damage cases, which is not true. The *Restatement* makes it very clear that punitive damages against a principal are appropriate in many instances, including several that are found in this case (including "apparent authority" situations). *Restatement* § 217 C. As to liability under treble damage statutes, such as the federal antitrust laws, the *Restatement* expressly, and quite appropriately, says that § 217 C is not applicable and it makes "no statement" on the question. § 217 C, Comment *c*. As the cases cited *supra* demonstrate, the federal courts have not hesitated to apply the apparent authority rule in treble damage situations, or even in criminal cases not requiring specific intent. While it is true that in *United States v. Ridglea State Bank*, 357 F.2d 495 (5th Cir. 1966), the Fifth Circuit Court of Appeals considered the punitive purpose of the False Claims Act as an additional ground for refusing to impute the specific unlawful intent of a bank officer to the defrauded employer bank, the fact remains that the Government was seeking to impute a specific intent from the wrongdoer to the victim, a situation precisely the same as that found in *Standard Oil, supra*. We have found no case, and none is cited in the ASME's Brief, where a court has refused to hold a principal liable for the *conduct* (and general intent) of an apparent agent where punitive, or statutory double or treble damages were being sought by the injured third party. We note, of course, that the ASME makes no argument that treble damages or even criminal penalties could not be assessed against a principal for acts of agents within their actual authority or where the principal has ratified those acts. Both are present in this case.

It is Congress that fixed the treble damage rule in order to encourage private vigilance over the free competitive marketplace which is the bedrock of this nation's economy. If it provides a "windfall" for plaintiffs such as Hydrolevel, as the ASME suggests at p. 34 of its Brief, it is a "windfall" granted by Congress, and if non-profit corporations are to be exempted from that rule the exemption should also be granted by Congress.

III. AS A MATTER OF POLICY, PRIVATE GROUPS THAT EXERCISE UNREGULATED POWER OVER THE ECONOMIC FREEDOM OF OTHERS SHOULD NOT BE EXEMPTED FROM THE TRADITIONAL RULES OF *RESPONDEAT SUPERIOR* IN ANTITRUST CASES

In Point III of its Brief, the ASME presses two "policy" arguments for the relief it seeks from this Court. First, gloomily predicting that if the ASME and "innumerable" other non-profit organizations with "exemplary records" are held responsible for the anticompetitive acts of their "volunteer" agents, they would have no choice but to abandon their good works. This would create, we are told, a vacuum that the government would have to fill, thus endangering the entire "quality of life in America." Second, the ASME urges that "non-profit" organizations, such as itself, are in a "vulnerable financial position" and therefore the "risk of loss" should be placed solely upon the "disloyal" individual "volunteer" and his profit-making employer, both presumed to be more solvent than the non-profit organization which employed the individual. Viewed against the ASME's own circumstances, neither of these "policy" arguments should persuade this Court to exempt the ASME from the traditional law of *respondeat superior* in antitrust cases.

A. The History of the ASME Demonstrates the Need for the Application of the Traditional Legal Standard of Accountability

The ASME argues that making it accountable for the "disloyal" acts of its agents would punish it for something beyond its power to control and that, in any event, such sanctions are unnecessary because the "instances of abuse, such as in this case, are certainly rare. . . ." ASME Br. 45. Not content with this vague generalization, at p. 45 n.* of its Brief the ASME makes the following representation:

> ASME has been promulgating and maintaining voluntary safety standards for nearly one hundred years without a single prior instance of abuse of its procedures like that present in this case. The innumerable other professional organizations, of which the *amici curiae* referred to below are representative, have maintained similar exemplary records.

Not only are these representations of fact outside the record, they are, regrettably, false. The ASME has been dominated by commercial interests since the day it was organized, although such domination is not always inconsistent with a high regard for safety or with the desirable standardization of product and procedure that is essential for the development of a rational *and* competitive marketplace. Domination by private commerical interests does, however, involve inherent dangers for a free marketplace, where innovation and competition interact and provide the economic and social benefits to the public which are the goals of the Sherman Act. It is not our position that these goals *cannot* be met by a private organization that administers a standard-setting program, but in *this* case the record is clear that the ASME made no effort whatsoever to accommodate the objectives imposed upon them by the antitrust laws.

The ASME's history exemplifies the principle that if individuals having a commercial interest in a market are permitted to regulate that market, they will regulate it for their own benefit and not for the benefit of outsiders.[34] Since its inception the ASME has been run by a small group of businessmen and repeated efforts by the membership to change that attitude have had little positive effect. *See* M. Calvert, *The Mechanical Engineer in America, 1830-1910,* 111, 120-23 (1967).

Last year the ASME celebrated its one-hundredth birthday. To mark the event, the ASME commissioned a book by Bruce Sinclair, *A Centennial History of the American Society of Mechanical Engineers, 1880-1980* (University of Toronto Press, 1980) (hereinafter *"Centennial"*). Because this historical study was copyrighted by and published for the ASME, it constitutes, in effect, the Society's autobiography. *Centennial* chronicles how, in its early years, the ASME had been dominated by a small group of authoritarian New Yorkers, primarily "utility men" (pp. 65-71, 88-98, 100-05, 111, 181-85), and how, when the ASME first moved into the field of standard-setting in the 1880's, it was quickly recognized that the commercial interests of its influential members would affect the way they created and administered those standards. Because the ASME recognized

[34] *Cf. United States v. Topco Assocs., Inc.,* 405 U.S. 596, 611 (1972).

that its standard-setting members would try to advance their individual commercial interests, it tried to "balance" the committees, including the boiler code committee, with "representatives" of both manufacturers and users so that "in their own interest users would prevent the representative producer from measures that might give him an unfair market-place advantage over his own competitors." *Centennial* 55, 213. For this reason, those who worked on the boiler code "watched each other 'pretty closely,' " but "[t]hey also knew that some of the ASME's members often used or tried to use its programs and activities to further the commercial concerns of their employers." *Centennial* 152. When the Boiler Code was first adopted in 1914, the "balance" concept, and the problems inherent in it, remained, and have continued through to the present. App. 617.[35]

An important characteristic of the ASME's boiler code committee has been the stability of its membership. The ASME Council exempted the boiler committee and its subcommittees from the usual rule that members be rotated, with the result that many of its members, like John James, have been virtually permanent fixtures in their "volunteer" committee jobs. For example, from 1914 until 1941, David S. Jacobus was a founder, then Vice-Chairman and finally Chairman of the Main Committee, maintaining "the Babcock and Wilcox 'seat' on the committee, a term its members commonly used to express the fact that major firms in the industry were always represented." *Centennial* 151-52. Moreover, it was only the "major firms"

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[35] The "McAbee Affair" in 1937 was almost an exact preview of the Hydrolevel case, but apparently the ASME learned little from the experience. McAbee, the owner of the Carbonic Gas Equipment Company, complained that a 1936 "addendum" to the Code which required that a difficult test be applied to his product was the "fruit of a conspiracy intended to drive him out of business." McAbee's competitors, whose products were not covered by this new "addendum" to the Code, made up a majority of the "special committee" which drafted the new testing rules. According to *Centennial*, McAbee successfully sued the members of the committee under the Sherman Act and when he threatened the ASME itself with a similar action, the ASME's Main Committee conveniently "interpreted" the new rules to exempt McAbee's product and thus "avoided what might have been an embarrassing and costly affair." *Centennial* 155-56.

with an interest in the Code that could afford to donate large amounts of engineering talent to the code-developing work. *Id. See also* E. Layton, *The Revolt of the Engineers* 18 (1971). This led quite naturally to the fact that,

> at a personal level the committee often acted the way clubs do. Its members usually occupied senior positions in industry, they met frequently, formed long-lasting friendships, and generally shared the same social, economic and political viewpoints. And in the way such groups work, they occasionally took care of colleagues in times of difficulty. Its older members remember more than one case in which that happened. * * * This close cooperation, with such personal, professional, and business implications to it, created in ASME's boiler code committee an institutional device of great power. * * * Over the years, many of its long-term members gave a great deal of time and energy to code work, out of a genuine sense of professional obligation. But the fact that in America a direct connection to industry continued to be an active element in the formulation of standards meant not only that the code was vulnerable to attack on the grounds of self-interest, but also that it was sometimes guilty of the charge.

Centennial 156-57 (emphasis added).

It is against this background of self-proclaimed "exemplary behavior" that the ASME asks this Court to relieve it, and other non-profit organizations like it, from liability for the anticompetitive impact of its standard-setting machinery. If instances of abuse are indeed "rare," as the ASME claims, then we see no need for such an exemption from the traditional rules of agency law. If, on the other hand, conflicts of interest are endemic, as the ASME's own history indicates, immunizing "voluntary" private standard-setting organizations from liability for the monopolistic practices of its agents would open the largest loophole in the Sherman Act since *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895). It would remove all incentive from such organizations to choose their agents with care and to supervise them properly. In fact, it would give them every incentive to close their eyes to the anticompetitive machinations of their "volunteers" and to delegate even more power to them.

Because non-profit organizations like the ASME exist only to serve the public, as we are told by the ASME, the activities of their agents could never be intended to "benefit" the organization. Therefore, under the rule urged upon this Court, no matter how serious the anticompetitive conduct, it can never be imputed to the organization because it is done, by definition, not "for the benefit" of the organization. However, non-profit corporations can do wrong as well as right under the antitrust laws, *see, e.g., City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Brenner v. World Boxing Council*, ____ F. Supp. ____, [1980-81] Trade Cases (CCH) ¶ 63,789 at p. 78,217 (S.D.N.Y. 1981)(citing opinion of Court of Appeals in the instant case), and no authority supports the application of different agency principles to them.

The ASME claims that because it has no way to protect itself against such conflicting interests,[36] such liability, and the resulting financial risk, would cause it to abandon the field to government. This argument apparently had some effect on the Court of Appeals, although similar apocalyptic predictions have been routinely rejected by this Court as being more appropriately addressed to Congress than to the Courts. *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980); *United States v. Topco Associates*, 405 U.S. at 611-12; *United States v. Singer Manufacturing Co.*, 374 U.S. 174, 196 (1963). The Courts are simply

[36] In view of the record, it is simply disingenuous for the ASME to tell this Court that the April 29, 1971 letter "would have escaped detection under any system" and that only someone with knowledge of "M&M's conspirational purposes" could detect the letter's "hidden significance." ASME Br. 37 n.*. Before he learned anything else about the case, the ASME's own expert witness immediately "detected" that the letter would have a devastating impact upon Hydrolevel. J.A. 113. Similarly, Mr. R. J. Cepluch, a Main Committee member, saw the same thing as early as May, 1972. J.A. 8. The ASME's top officers became aware of the M&M connection no later than Mr. Rymer's March 23, 1972 and have, to this day, done nothing about it despite the ASME's power and unique resources in the field. The facts clearly justify a finding that the ASME deliberately refused to take corrective action in order to protect its agents.

not equipped to deal with policy arguments such as those made by the ASME and its *amici* on behalf of "innumerable" unidentified organizations.

If, indeed, the ASME's private standard-setting programs cannot be made objective and fair, and conform to the goals of the Sherman Act, then perhaps their demise is long overdue. We do not accept, however, the doomsday threat at face value because we think it obvious that relatively few changes in how the Code is administered could avoid similar abuses in the future. Careful selection and frequent rotation of those in powerful committee positions, the appointment of a devil's advocate or ombudsman and the establishment of mandatory and meaningful internal review procedures would probably be enough in themselves. Why the ASME put Hoyt, a man whom it admits had no technical competence in the field (ASME Br. 8), in charge of supervising the "volunteers" on the code-developing committees is a question that has never been answered. Prompt, public and appropriate disciplinary measures would also deter those "volunteers" who might be tempted to abuse their positions for private purposes. Moreover, if an abuse does occur, a genuine effort to repudiate it and contain its spreading influence would also minimize the ASME's financial risk. Insurance is also surely available to cover any risk that remains.

Bankers, attorneys and stockbrokers are fiduciaries and are held to exceedingly strict standards of conduct with respect to the interests of their clients, including an absolute duty to control the conduct of their agents,[37] because those clients are in a position of total dependence upon their professional skill and objective judgment. Professional organizations which exercise regulatory power over a client industry should likewise be accountable for the conduct of their designated agents. What sort of internal procedures should be adopted to make private standard-setting or certification programs consistent with the goals of the Sherman Act and insure fairness and

[37] *See, e.g.*, Barber, *Control and Responsibility in the Professions*, Pol. Sci. Q. 599, 603-04 (Winter 1978-79); Harper & Kime, *The Duty to Control the Conduct of Another*, 43 Yale L.J. 886, 904 (1934). Whether the agent is a "volunteer" or a full-time staff member is immaterial. Either can do the same kind of damage.

objectivity but still serve their regulatory purposes has been the subject of considerable scholarly analysis,[38] governmental investigation[39] and litigation.[40] In this case, however, no matter how that standard of professional duty or responsibility is formulated, the conduct of the ASME with respect to Hydrolevel did not measure up.

B. It is Appropriate That The ASME Should Share the "Risk of Loss" In This Case

One of the underlying principles of agency law, as the ASME expressly recognizes, is to make the principal jointly liable with the agent for damage caused by that agent. This serves the public because the principal is given a strong incentive to select and supervise his agents with care. As pointed out earlier in this Brief, this is not unfair since the principal is utilizing others to perform functions that expand his power and it is not unreasonable to require the principal to be liable for an agent's *improper* acts (along with the agent), since he benefits by the agent's *proper* conduct. Moreover, because

---

[38] *See, e.g.*, R. Bork, *The Antitrust Paradox*, 330-44 (1978); D. Hemenway, *Industrywide Voluntary Product Standards* (1975); L. Sullivan, *Handbook on the Law of Antitrust*, 243-52 (1977); Blecher, *Product Standards and Certification Programs*, 46 Brook. L. Rev. 223, 227 (1980); Levin, *The Limits of Self-Regulation*, 67 Colum. L. Rev. 603, 611-12 (1967).

[39] *See, e.g.*, Federal Trade Commission (Bureau of Consumer Protection), *Standards and Certification, Proposed Rule and Staff Report* (December 1978); *Voluntary Industrial Standards, Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975); United States Department of Commerce, *Voluntary Standards and Testing Laboratory Accreditation* 20 (July 1977); Legality of a Proposed Standard Certification Program, 78 F.T.C. 1628, 1629-30 (1971).

[40] *See, e.g., Gibson v. Berryhill*, 411 U.S. 564 (1973); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Radiant Burners, Inc. v. People's Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Eliason Corp. v. Nat'l Sanitation Foundation*, 614 F.2d 126 (6th Cir.), *cert. denied*, 449 U.S. 826 (1980); *Gunter Harz Sports, Inc. v. United States Tennis Ass'n*, ____ F. Supp. ____, [1981-82] Trade Cases (CCH) ¶ 64,243 (D. Neb. 1981); *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315 (D. Conn. 1977); *Blalock v. Ladies Professional Golf Ass'n*, 359 F. Supp. 1260 (N.D. Ga. 1973); *Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n*, 261 F. Supp. 154 (D. Ore. 1966), *aff'd*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).

agents are usually of more modest means than the principal, this rule tends to assure that an injured third party will be able to collect his damages from *someone*.

The ASME would have this Court put a *caveat* on that traditional rule solely for the benefit of non-profit corporations in antitrust cases, where the potential liability is substantial. Accordingly to the ASME, when the principal is in a more "vulnerable financial position" than the agent, the court should impose "a stricter standard of vicarious liability." ASME Br. 44. In this case, of course, that "stricter standard" would result in liability for the agent but not for the ASME. Even if it could be fairly applied, which we doubt, such a rule would stand the law of agency on its head. That law imposes liability upon the principal because he normally benefits from the agent's *proper* conduct, not because he stood to benefit from the agent's *improper* acts. Moreover, the "benefit" from those proper activities need not be financial, although in the instant case the ASME "benefitted" handsomely from the standard-setting activities of its volunteers.[41]

The agents, of course, also remain liable for their own improper acts and in this case the agents' other principals were similarly liable. We cannot assume, as the ASME does, that the members of the ASME and their full-time employers will always be less "financially vulnerable" than the ASME. The members and their employers may just as likely be judgment-proof, or, as here, the injured plaintiff may be forced to settle with fewer than all defendants for far less than his actual damages simply to keep himself out of bankruptcy and to

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[41] In 1978 the ASME had a net (non-taxable) income of over $2,300,000, from a gross income of more than $14,300,000. In that year, sixty-one percent (61%) of the ASME's gross income, or almost $9,000,000, was generated by sales of its codes and standards and its "Certification Program." At the time of trial the ASME's investment portfolio alone was worth over $15,000,000. PX 22 (HX V. 440-465)(not in evidence). This exhibit was excluded by Judge Weinstein with the understanding that the ASME would not seek to exploit its "non-profit" status before the jury. *See* App. 675-78, 710-12, 1762. As demonstrated above, these revenues are realized only by obtaining significant contributions of engineering talent from companies in the industry, a "benefit" to the ASME that wholly depends upon the perception of those companies that they are getting something in return.

"hang on" for a few more months. If the ASME's argument as to who should bear the "risk of loss" prevails, an argument that ignores the victim, the injured party's chances of being made whole are greatly diminished. Once Hydrolevel had a superior patented product, a large and loyal source of financing, a moribund market ripe for penetration, three dedicated officers willing to live on poverty-level wages for a decade while developing their business and, of course, the American Dream. Now, thanks to the ASME and its agents, it has nothing except this lawsuit. Who should bear the risk of loss? The question answers itself.

As the Court emphasized in *Bankers Life Insurance Co. v. Scurlock Oil Co.*, 447 F.2d 997, 1007 (5th Cir. 1971), a case on which the ASME inexplicably relies:

> [W]hen a principal puts his agent in a position of responsibility and gives that agent certain powers to act in the principal's behalf, third parties are entitled to rely on an agent's good faith performance of his apparent powers. And if the agent uses those powers in a deceitful manner, it is not the innocent third party who should suffer, but the principal who inflicted the deceitful agent upon the public in the first place.

That the injury inflicted is a competitive injury unlawful under the Sherman Act rather than just tortious under common law principles cannot and should not justify the creation of special exemptions to the traditional principles of *respondeat superior.*

CONCLUSION

The ASME received a fair trial and, for the foregoing reasons, the judgment of the Court of Appeals and the verdict of the jury on the issue of liability should be affirmed. Moreover, considering that the Court of Appeals improperly characterized the June 9, 1972 ASME letter as a "retraction" of the ASME's participation in the conspiracy, Hydrolevel's pending petition for a writ of certiorari, No. 80-1771, should be granted and the judgment of the Court of Appeals on the issue of damages should be reversed pursuant to Rule 23.1 of this Court, with directions to reinstate the damage verdict of the jury. *See Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980).

Respectfully submitted,

CARL W. SCHWARZ
One Farragut Square South
Washington, D. C. 20006
(202) 347-1631
Attorney for Respondent
Hydrolevel Corporation

STEPHEN P. MURPHY
WILLIAM H. BARRETT
METZGER, SHADYAC & SCHWARZ
Of Counsel

October 20, 1981

The American Society of Mechanical Engineers
United Engineering Center / 345 E. 47th St., New York, N.Y. 10017 / 212 752-6800

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April 29, 1971

Mr. Gene Mitchell
McDonnell & Miller, Inc.
3500 North Spaulding Avenue
Chicago, Illinois 60618

Subject: Section IV Heating Boilers Code - Par. HG-605

Dear Mr. Mitchell:

The inquiry contained in your letter of April 12, 1971, was referred to the Chairman of the concerned Subcommittee who offers the following advice:

A low-water fuel cut-off is considered strictly as a safety device and not as some kind of an operating control. Assuming that the water gauge glass is located in accordance with the requirements of Par. HG-602(b), it is the intent of Par. HG-605(a) that the low-water fuel cut-off operate immediately and positively when the boiler water level falls to the lowest visible part of the water gauge glass.

There are many and varied designs of heating boilers. If a time delay feature were incorporated in a low-water fuel cut-off, there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period.

Very truly yours,

W B Hoyt

W.B. Hoyt
Secretary

/sh

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Asst. Secretary
R.D. SUTTON

June 9, 1972

COPY

Hydrolevel Corporation
153 Verdi Street
Farmingdale, N.Y. 11735

Attention: Mr. Russell S. Rymer, President

SUBJECT: Section IV, Heating Boilers - Par HG-605
Your Letter of March 23, 1972

File: BC 72-99

Gentlemen:

As indicated in our letter of March 27, 1972, your letter of March 23, 1972 was considered by the applicable Committees at their meeting held on May 4 and 5, 1972.

The Committee confirmed the intent of our letter to the attention of Mr. D. De Leonardis of February 8, 1972.

This will advise that there is no intent in Section IV to prohibit the use of low water fuel cutoffs having time delays in order to meet the requirements of Par. HG-605 (a). This paragraph relates itself to Par. HG-602 (b) which specifically delineates the location of the lowest visible part of the water gage glass.

If a means for retarding control action is incorporated in a low-water fuel cutoff, the termination of the retard function must operate to cutoff the fuel supply before the boiler water level falls below the visible part of the water gage glass.

Very truly yours,

ITT NO. 002414

W. B. Hoyt,
Secretary

drp/

The American Society of Mechanical Engineers
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E.W. REYNOLDS

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W.J. WOOLLACOTT

Asst. Secretary (SCIII)
N. BEN HURI

Asst. Secretary (SC VIII)
F.P. MODY

February 8, 1972

Hydrolevel Corporation
153 Verdi Street
Farmingdale, New York 11735

Attention: Mr. Dominick De Leonardis
Vice President

Subject: Section IV, Heating Boilers, ASME Code - Par HG-605

Dear Mr. De Leonardis:

As you requested in your letter of January 25, 1972, I am showing below, the April 29, 1971 reply of Mr. Hoyt to an inquirer on time delays of low water cut offs.

> " A low water fuel cut-off is considered strictly as a safety device and not as some kind of an operating control. Assuming that the water gage glass is located in accordance with the requirements of Par. HG-602(b), it is the intent of Par. HG-605(a) that the low water fuel cut-off operate immediately and positively when the boiler water level falls to the lowest visible part of the water gage glass.
>
> " There are many and varied designs of heating boilers. If a time delay feature were incorporated in a low water fuel cut-off, there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period."

I hope this helps clarify the intent of the subject paragraph.

Very truly yours,

R. D. Sutton

R.D. Sutton
Assistant Secretary

RDS/ef

ITT NO 002680

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CLERK

No. 80-1765

In The Supreme Court of the United States

OCTOBER TERM 1981

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,

Petitioner,

—v.—

HYDROLEVEL CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER

HAROLD R. TYLER, JR.
Attorney for the American Society of Mechanical Engineers, Inc.
30 Rockefeller Plaza
New York, New York 10112
(212) 541-4000

Of Counsel:
RICHARD D. PARSONS
FREDERICK T. DAVIS
STEVEN C. CHAREN

PATTERSON, BELKNAP, WEBB & TYLER
30 Rockefeller Plaza
New York, New York 10112

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No. 80-1765

In The
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OCTOBER TERM 1981

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., *Petitioner,*

v.

HYDROLEVEL CORPORATION, *Respondent.*

REPLY BRIEF OF PETITIONER

Preliminary Statement

ASME respectfully submits this Reply Brief in response to the brief of respondent Hydrolevel Corporation and to the *amicus* brief filed on behalf of the United States.

The issue before this Court is whether an organization can become part of an antitrust conspiracy based solely on the disloyal acts of two volunteer members who had no intent to benefit it. ASME's brief demonstrated that the holding of the Court of Appeals was not supported by any antitrust precedent and was refuted by virtually every decision or comment that has addressed the issues presented. The briefs of Hydrolevel and the Government do not focus on this question, nor do they adduce a single decision that rebuts our showing. Instead, both

assiduously avoid supporting—or even addressing—the appellate panel's decision, and instead rely upon a hodge-podge of agency concepts that frequently are erroneously stated, and in any event have nothing to do with the Questions Presented in this case. As this brief will demonstrate, however, the exceptional principle of "apparent authority" without any requirement that the agent intend to benefit the principal, which was the exclusive basis for the panel's affirmance of the District Court's judgment, has never been and should not be used as a basis for antitrust liability.

ARGUMENT

POINT I

AN ORGANIZATION SHOULD NOT BE HELD STRICTLY LIABLE UNDER THE ANTITRUST LAWS BASED SOLELY ON THE ACTS OF DISLOYAL AGENTS WHO DID NOT INTEND TO BENEFIT THE ORGANIZATION

Most of the arguments presented by Hydrolevel and the Government are addressed to issues that the Court of Appeals did not decide, and are thus not before this Court.

The issue before the Court of Appeals was the sufficiency of the evidence that ASME was an active and knowing member of an antitrust conspiracy. ASME argued that there was no evidence of "a unity of purpose" or a "common design and understanding" among ASME and its alleged conspirators, *American Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946), or that ASME engaged in "joint and collaborative action," *United States* v. *General Motors Corp.*, 384 U.S. 127, 143 (1966); *see also Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951). As set forth in greater detail in our main brief, *see* ASME Br. 39 at n., the federal courts have regularly reversed jury verdicts or affirmed dismissals of antitrust complaints where there was no showing of

a "deliberate and intentional combination." *See, e.g., International Railways of Central America* v. *United Brands Co.*, 532 F.2d 231, 241 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976). In order to prevail on appeal, Hydrolevel had to show record evidence that ASME knew of at least some of the illicit goals of the alleged conspiracy and intended to participate in it.

The only basis upon which Hydrolevel could conceivably argue that ASME had contemporaneous knowledge of and intended to participate in anticompetitive activity was the theory that James' and Hardin's knowledge of their own acts and their intent to benefit their true corporate principals, M&M/ITT and Hartford, should automatically be imputed to ASME and should thus constitute a "unity of purpose" between ASME and the other defendants. For the reasons set forth in the margin, Hydrolevel's claim in this Court that the activities of staff secretary W.B. Hoyt independently demonstrate ASME's complicity, *see* H. Br. 7, 13,* is absurd and was not seriously argued in the Court of Appeals.**

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* In addition to the abbreviations heretofore used, *see* ASME Br. 2 at n., "H. Br." refers to Hydrolevel's brief in this Court, and "Gov't Br." refers to the brief of the Solicitor General.

** As staff secretary of the B-PV Committee, Hoyt performed the ministerial function of receiving written inquiries and, under the circumstances in this case, *see* ASME Br. 6, directing them to the proper subcommittee chairman and then issuing the subcommittee chairman's "advice" in his name. The evidence at trial was unequivocal that he had no knowledge of the low-water fuel cut-off market, and was not in a position to appreciate, let alone join in, the anticompetitive acts of M&M/ITT or Hartford. App. 864. While Hydrolevel coyly states that there was "conflicting evidence at trial" as to whether Hoyt handled the M&M inquiry in a deliberately irregular manner, *see* H. Br. 7, the record demonstrates that Hoyt followed regular and written procedures in directing the M&M inquiry—one of literally thousands that passed through his hands each month—to the attention of the relevant committee or subcommittee chairman. ASME Br. 5-8. Hydrolevel's surmise that Hoyt's mechanical acts "justified the inference that Hoyt was aware of the scheme concocted by James and Hardin," H. Br. 7, has no support in the record. The panel did not rely on or even mention Mr. Hoyt's actions as a basis for affirming the liability judgment.

In support of its judgment, Hydrolevel argued in the Court of Appeals two theories of vicarious liability, both of which the Court of Appeals expressly declined to reach. A-12, A-13. First, Hydrolevel argued that the acts of James and Hardin should be imputed to ASME under a theory of "actual authority." Second, Hydrolevel argued that even if ASME did not contemporaneously know of or participate in James' or Hardin's acts, it subsequently ratified them. Hydrolevel never argued that ASME would be liable for acts of its agents within the scope of their "apparent authority" and, indeed, the theory of apparent authority was not briefed by either party in the Court of Appeals.

Instead of reaching either of the two theories argued by the parties, the panel held that the question whether ASME knowingly and intentionally participated in a conspiracy should be governed by agency principles of "apparent authority." While acknowledging that "the appropriate theory for conventional torts" requires a showing that the agent intended to benefit the principal's interest, A-13, the panel held that this requirement is not necessary in antitrust cases, and thus that ASME's "unity of purpose" and "common design and understanding" could be based exclusively on the acts of disloyal volunteer members who had no thought of benefiting ASME. The principal issue presented by this appeal is whether the Court of Appeals erred in its legal conclusion that ASME could be deemed part of an antitrust conspiracy—and thus be liable for three times the damages caused by all of ASME's alleged conspirators—solely because two of its 90,000 members, even though not intending to benefit ASME at all, were outwardly acting within the scope of their "apparent authority." If the panel's reasoning was erroneous, at a minimum the decision must be reversed and the case remanded for reconsideration under the proper standard. As this brief will demonstrate, the briefs of Hydrolevel and the Solicitor General avoid rather than refute ASME's showing that the panel's holding is totally unsupported by precedent, is inconsistent with antitrust principles, and is simply bad policy.

A. An Agent's Intent to Benefit His Principal Is Required To Impute the Agent's Knowledge and Intent to the Principal; the Panel's "Apparent Authority" Standard Should Not Govern Antitrust Suits.

Even though the principal issue before the Court is the correctness of the panel's holding that ASME could be found liable for participating in an antitrust conspiracy based solely on the acts of agents who did not intend to benefit it, both Hydrolevel and the Government give scant attention to the point. Virtually ignoring the holding of the Court of Appeals, they focus instead on theories that the Court of Appeals formally did not reach or implicitly rejected.*

T' hearted support given to the panel's holding is at : anpersuasive. First, Hydrolevel claims that *United Mine Workers of America* v. *Coronado Coal Company*, 259 U.S. 344 (1922), somehow "implied" that an organization may be shown to be part of an antitrust conspiracy based on the acts of its agents within the scope of their "apparent authority." As even Hydrolevel is forced to admit, *see* H. Br. 37, n.30, the only antitrust case interpreting the *Coronado Coal* decisions has held that an apparent authority rationale cannot

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* The Government not only discusses the panel's holding only in a small portion of its brief, *see* Gov't Br. 21-25, but also attempts to shield the panel's holding by claiming, in its Point I, that ASME should not be allowed to seek review of the panel's opinion since it did not object to the jury charge. The accuracy of the instructions to the jury—the only substantive issue that the Government even addresses—is not an issue in this Court. ASME's argument in the Court of Appeals was that there was insufficient evidence—indeed, no evidence—showing that ASME intentionally and knowingly participated in an antitrust conspiracy. That is an issue of sufficiency of the evidence, not a question of the jury charge. The panel resolved the sufficiency issue by declaring that the appropriate standard is an "apparent authority" principle, and that it thus did not need to find *any* evidence that James and Hardin intended to benefit ASME. If ASME is correct that the "apparent authority" theory cannot provide the exclusive basis for linking an otherwise unwitting organization to an antitrust conspiracy—an issue that is squarely raised by the Questions Presented in both ASME's petition and main brief—it follows at a minimum that the panel's opinion must be reversed and the case remanded to the Court of Appeals for a determination of the sufficiency of the evidence under the proper standard.

be used to impute a faithless agent's intent to the principal.* *See Truck Drivers' Local No. 421* v. *United States,* 128 F.2d 227, 235-36 (8th Cir. 1942). Hydrolevel's attempt to distinguish *Truck Drivers'* on the ground that the "case involved only allegations of actual authority and ratification", H. Br. 37 n.30, is simply false: the Eighth Circuit reversed the verdict against the organization based on insufficiency of the evidence tying it to an antitrust violation, squarely holding that "mere apparent agency would not be sufficient to take the matter to the jury." 128 F.2d at 235.

Second, Hydrolevel recites the panel's basis for applying an "apparent authority" rationale, citing *Gleason* v. *Seaboard Air Line Railway Co.,* 278 U.S. 349 (1929), H. Br. 37, *see also* Gov't Br. 24, without even attempting to address or refute ASME's demonstration that these principles are inapplicable to and have never been applied in an action involving punitive or treble damages. *See* ASME Br. 30-35; *United States* v. *Ridglea State Bank,* 357 F.2d 495, 499 (5th Cir. 1966); *Bankers Life Insurance Co. of Nebraska* v. *Scurlock Oil Co.,* 447 F.2d 997, 1004-05, n.12 (5th Cir. 1971); *Oman* v. *United States,* 179 F.2d 738, 741 (10th Cir. 1949); *Ruidoso Racing Ass'n, Inc.* v. *Commissioner,* 476 F.2d 502, 506 (10th Cir. 1973). *See also Lake Shore & Michigan Southern Railway Co.* v. *Prentice,* 147 U.S. 101 (1893), discussed at p. 11, *infra.*

Hydrolevel then claims that the *Gleason* rationale has been adopted "by many other federal court decisions applying the 'apparent authority' concept to find principals liable in a wide variety of federal regulatory and common law causes of action." H. Br. 37. With irrelevant exceptions,** every decision

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* Although Hydrolevel does not reveal this, the only decision upon which it relies for a contrary reading of *Coronado Coal, Mile Branch Coal Co.* v. *United Mine Workers of America,* 266 F.2d 919 (D.C. Cir. 1959), is not an antitrust case.

** *Dark* v. *United States,* 641 F.2d 805 (9th Cir. 1981), involved a tax assessment under a treasury regulation, 26 C.F.R. § 44.4401-2(a)(1), specifically making a principal liable for money received by an agent. *Izard* v. *Arndt,* 483 F. Supp. 261 (E.D. Wis. 1980), involved a suit under the federal

thereafter cited by Hydrolevel, *see* H. Br. 38, n.31, and by the Government at Gov't Br. 24, n.20, involved common law fraud claims and other types of tort liability that, as ASME already demonstrated in its main brief (ASME Br. 27-29, 30 n.), fall into the narrow category of cases appropriately governed by the principle of apparent authority. *See, e.g., National Acceptance Co. of America* v. *Coal Producers Association, Inc.*, 604 F.2d 540, 542-43 (7th Cir. 1979) ("common law fraud"); *Bowman* v. *Home Life Insurance Co. of America*, 243 F.2d 331, 333 (3rd Cir. 1957) (fraud suit; "wholly [governed by] Pennsylvania law"); *Employers' Liability Assurance Corp.* v. *L. J. Marcotte Insurance Agency*, 314 F.2d 470 (8th Cir. 1963) (fraud in handling insurance claims).

By contrast, in each of the true "federal regulatory" suits cited at ASME Br. 25-26, n. (none of which Hydrolevel successfully distinguishes) federal courts have uniformly held that an agent's acts and illicit intent will not be imputed to the principal if the agent did not intend to benefit it. *See also Rochez Brothers* v. *Rhoades*, 527 F.2d 880 (3rd Cir. 1975), which held in a suit under § 20(a) of the Securities Exchange Act of 1934 that an officer's conduct and intent will be

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fair housing acts. The defendant argued that a race discrimination suit should be dismissed against him because his wife, who managed a housing business with him, had committed the discriminatory acts. Understandably enough, the court dismissed this defense. Since the defendant's wife obviously intended to benefit him in so acting, the decision has no application to this case.

The only decision that conceivably helps Hydrolevel is *Holloway* v. *Howerdd*, 536 F.2d 690 (6th Cir. 1976), cited by the Government at Gov't Br. 25, n.20. In a suit under Section 12(2) of the Securities Act of 1933, the court held that a brokerage firm was liable for fraudulent sales by a licensed agent. The discussion of agency principles appearing at 536 F.2d 695-96 is particularly confused; while the opinion first appears to hold that apparent authority is *not* a basis for liability since "[t]here was no proof that [the defendant] 'usually' engaged in the sale of unregistered stock," *id.* at 696, the opinion goes on to provide, without any citation of authority, that the defendant "had an affirmative obligation to prevent use of the prestige of its firm to defraud the investing public." *Id.* At any rate, the opinion does not even address the applicability of *Restatement* § 235 (discussed *infra* at pp. 15-17) and it is inconsistent with other securities decisions addressing the issue. *See* ASME Br. 26, n.

imputed to the corporation only "when the officer's fraudulent conduct was (1) in the course of his employment and (2) for the benefit of the corporation." *Id.* at 884.*

Finally, at the very end of its discussion of "apparent authority," Hydrolevel purports to discuss decisions applying the apparent authority theory to antitrust violations. H. Br. 39-40. None has the slightest bearing on this case. In *Continental Baking Co.* v. *United States,* 281 F.2d 137 (6th Cir. 1960), contrary to Hydrolevel's assertion, H. Br. 39, "intent to benefit" was not at issue, as the court assumed that the price fixing agreement was designed to "inure to the corporation's benefit," *id.* at 150; rather, in reversing, the court directed that on retrial the agents would bind their principals only "by reason of the knowledge of or acquiescence in their actions by their superiors [or if] their superiors had adopted or ratified such action." *Id.* at 151. Similarly in *United States* v. *Continental Group, Inc.,* 603 F.2d 444 (3rd Cir. 1979), *cert. denied,* 444 U.S. 1032 (1980), the vice-presidents and managers of corporate defendants entered into a horizontal price fixing agreement on behalf of their corporations. Noting that "the Government must prove that the defendants agreed to effectuate an illegal purpose," *id.* at 462, the court held that a purposeful conspiracy had been demonstrated. Unlike this case, in both *Continental Baking, supra,* and *Continental Group, supra,* there was and could be no claim that those who entered into the price fixing arrangements did so without any intent to benefit the corporation, since the only possible purpose of price fixing is to increase corporate profits. Furthermore, *Azalea Drive-In Theatre Inc.* v. *Sargoy,* 394 F. Supp. 568 (E.D. Va. 1975), *rev'd on other grounds sub nom. Azalea Drive-In*

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* As Hydrolevel points out, H. Br. 38, n. 31, there is disagreement among the Circuits on the question whether the "controlling person" provision of § 20(a) preempts or adds to traditional agency principles. *Cf. Marbury Management, Inc.* v. *Kohn,* 629 F.2d 705 (2d Cir.), *cert. denied sub nom. Wood Walker & Co.* v. *Marbury Management, Inc.,* 449 U.S. 1011 (1980). Among those Circuits applying agency principles, however, the courts clearly hold that an agent's intent to benefit his principal is necessary to bind him.

Theatre, Inc. v. *Hanft*, 540 F.2d 713 (4th Cir. 1976), also cited by Hydrolevel, did not rely upon agency principles to determine the sufficiency of the evidence of conspiracy; rather, the Court relied upon "the circumstantial evidence that the defendants were acting in concert," 394 F. Supp. at 577 (footnote omitted), to conclude that the defendants were engaged in a joint and collaborative scheme. Contrary to Hydrolevel's representation that *Adams-Mitchell Co.* v. *Cambridge Distributing Co.*, 189 F.2d 913 (2d Cir. 1951) is a "civil antitrust suit," the court's discussion of agency principles concerned an "action for rescission of a contract." *See id.* at 917. By contrast, those federal decisions addressing the sufficiency of the evidence tying a corporation to an antitrust conspiracy through the acts of its agents have, as demonstrated in ASME's brief at 24-27, in every instance required a demonstration of the agent's "purpose to benefit the corporation." *See United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1006 n.4 (9th Cir. 1972), *cert. denied sub nom. Western International Hotels Co.* v. *United States*, 409 U.S. 1125 (1973); *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204 (3rd Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *United States* v. *Cadillac Overall Supply Co.*, 568 F.2d 1078, 1090 (5th Cir.), *cert. denied*, 437 U.S. 903 (1978).*

More fundamentally, Hydrolevel and the Government do not provide a cohesive analysis demonstrating why the concept of apparent authority, which both the appellate panel and the *Restatement (Second) of Agency* (1958) [hereinafter "*Restatement*"] recognize as an exception to the normal rule of liability, should provide the standard for judging the sufficiency of the evidence tying an organization to an antitrust conspiracy. As ASME's brief has already explained, *see* ASME Br. 28-35, in certain limited areas, holding a principal strictly liable for the

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* Incredibly, the Government relies on these very decisions as support for the contrary proposition that a "purpose to benefit the corporation" is not required. *See* Gov't Br. 25. The relevant portions of each opinion are quoted in ASME Br. 24-25, and show that the Government's contrary reading is simply wishful thinking.

acts of its agents (even if those agents did not intend to benefit the principal) is justified because, as between an innocent third party and a principal who generally benefits from his agent's acts, it is appropriate to make the third party whole through the assets of the principal. All of the cases cited at H. Br. 38, n.31, as well as *Gleason* v. *Seaboard Air Line Railway Co., supra,* 278 U.S. 349, fall into this category. This reasoning, however, does not logically apply, and never has been applied, to antitrust conspiracy cases, for several obvious reasons. The crucial issue in a conspiracy case is whether there was "understanding," an "agreement," or a "meeting of the minds." *See* pp. 2-4, *supra.* For this reason, even if a plaintiff need not show the specific intent of the alleged antitrust conspirators to achieve the anticompetitive effects of their conduct, as Hydrolevel claims at H. Br. 24, it nonetheless must show that each participant intended to participate in the conspiracy in the first place.* It simply makes no sense to hold that ASME "intended" to conspire with M&M/ITT or Hartford or knew of their activities, when all that ASME did was fail to ferret out the secret activities of two of its thousands of volunteer members. Indeed, the lower federal courts have uniformly held that "inadequate supervision and lax control" of employees are not a sufficient basis to establish liability for "knowing or intentional misconduct" under federal regulatory statutes. *See, e.g., Marbury Management, Inc.* v. *Kohn,* 629 F.2d 705, 711 (2d Cir.), *cert. denied sub nom. Wood Walker & Co.* v. *Marbury Management, Inc.,* 449 U.S. 1011 (1980) (suit under Securities Exchange Act of 1934); *Edwards & Hanly* v. *Wells Fargo Securities Clearance Corp.,* 602 F.2d 478, 485 (2d Cir. 1979), *cert. denied,* 444 U.S. 1045 (1980) (same).**

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* This distinction was clearly emphasized by this Court in a case upon which Hydrolevel heavily relies, *United States* v. *United States Gypsum Co.,* 438 U.S. 422, 443 n.20 (1978): "In a conspiracy, two different types of intent are generally required—*the basic intent to agree, which is necessary to establish the existence of the conspiracy,* and the more traditional intent to effectuate the object of the conspiracy." (emphasis added). *See also United States* v. *Continental Group, Inc., supra,* 603 F.2d at 462.

** The panel erroneously referred to James and Hardin as "two of ASME's highly placed volunteers," A-3, and both Hydrolevel and the

The apparent authority concept is particularly inappropriate when the issue is not upon whom to place the burden of making an innocent victim whole, but rather whether punitive or exemplary damages should be imposed as a deterrent against future misconduct. Contrary to Hydrolevel's claim that no court "has refused to hold a principal liable for the *conduct* (and general intent) of an apparent agent where punitive, or statutory double or treble damages were being sought by the injured party," H. Br. 40 at n.33 (emphasis in original), this Court has expressly held that a corporation is not liable for punitive or exemplary damages unless one of its principal officers—defined as "[t]he president and general manager, or, in his absence, the vice president in his place"—knew and approved of the agent's act. *Lake Shore & Michigan Southern Railway Co* v. *Prentice,* 147 U.S. 101, 114 (1893). In that case, a conductor of a railroad intentionally placed a passenger under arrest even though he knew that the passenger had committed no infraction. While agreeing that the railroad company was liable for actual damages caused by its agent, this Court held that it was not liable for punitive or exemplary damages. This is still a federal rule, *see Williams* v. *City of New York,* 508 F.2d 356, 360-61 (2d Cir. 1974), and has been applied in antitrust suits. *See, e.g., Haskell* v. *Perkins,* 28 F.2d 222, 223-24 (D.N.J. 1928), *rev'd on other grounds,* 31 F.2d 53 (3d Cir.), *cert. denied,* 279 U.S. 872 (1929) (relying on *Lake Shore Railway,* holds that treble damages suit may not be brought against an estate because treble damages are "exemplary and punitive"); *accord, Rogers* v. *Douglas Tobacco Board of Trade, Inc.,* 244 F.2d 471, 483 (5th Cir. 1957), *later op.,* 266 F.2d 636 (5th Cir.), *cert. denied,* 361 U.S. 833 (1959);

Government refer to them as "officers." *See, e.g.,* H. Br. 15; Gov't Br. 32 at n.26. Their highest positions in ASME were as volunteer chairmen of a subcommittee and as two of 25 members of the B-PV Committee, one of ASME's 66 "main committees." The subcommittees are the lowest tier of ASME's organizational structure, below ASME's officers (a president and 21 vice presidents), governing council, the executive committee, several policy boards, and the 66 "main committees."

Shires v. *Magnavox Co.*, 432 F. Supp. 231, 235 (E.D. Tenn. 1976).*

Finally, Hydrolevel makes a disjointed attempt to respond to ASME's showing that direct reliance by a plaintiff is a necessary prerequisite for imputing liability to a principal under a theory of "apparent authority." Hydrolevel begins by asserting that ASME "held them [James and Hardin] out to the world" as authoritative spokesmen concerning low water cut-offs. H. Br. 35. *Restatement* § 8, Comment a, expressly provides that apparent authority exists only with respect to those who believe or have reason to believe in the manifestation of authority; since Hydrolevel did not itself rely on the April 29 letter, it does not fall within this class. Similarly, *Restatement* § 27, Comment b, notes that the principal "cannot make a manifestation [of authority] 'to the world.'" *See also Restatement* § 159, Comment b (no "holding out to the world.").** Lastly, Hydrolevel seeks refuge in the provisions of *Restatement* § 265. *See* H. Br. 36 at n.29; *see also* Gov't Br. 23. As the commentary to that Section emphasizes, the concept that apparent authority may bind a principal even though the plaintiff did not himself

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* As the panel noted, *Restatement* § 217C similarly "restricts the imputation of liability for punitive damages." A-16, n.6. Since the *Restatement* then states, in Comment c, that the rule does "not apply to the interpretation of special statutes such as those giving treble damages, as to which no statement is made," the panel, as well as Hydrolevel, *see* H. Br. 40, n.33, apparently concluded that a broader test of agency liability is somehow appropriate under the antitrust laws. While the *Restatement* is silent on the issue of antitrust liability, its provision that "no statement is made" on the subject logically implies that a more narrow rule, rather than a broader rule, is appropriate. It is difficult to imagine more "punitive" sanctions than those imposed in antitrust conspiracy cases, where the defendant may be liable not only for three times the actual damages suffered by the plaintiff, but is liable for treble the damages caused by all co-conspirators as well.

** Hydrolevel also claims the ASME's reliance on Seavey, *Agency*, "confuses the concept of apparent authority with that of estoppel," H. Br. 36, n.29. In fact, Seavey states, at Section 8, p. 14, that "estoppel and apparent authority are alike in another respect. They *both* operate with respect only to those by whom the misleading manifestations are received." (emphasis added).

rely on that authority is limited to the specific torts there enumerated, specifically deceit "based upon misrepresentations," actions for physical harm "based upon an untrue representation of safety," or defamation. Not only do several of these torts require that the agent intend to benefit the principal, *see* ASME Br. 27-28, but they are admittedly exceptions to the general rules of agency and have no conceivable relevance to antitrust conspiracy cases.*

The illogic of the position advocated by Hydrolevel and the Government is emphasized when it is analyzed in the context of other antitrust decisions. For example, it is settled law that, while a corporation cannot normally conspire with its own employee for want of the requisite plurality, if the agent is motivated to an appreciable extent by an intent to benefit himself or a third party, he then acquires sufficient independence to be capable of conspiring with his employer. *See generally,* 16A Von Kalinowski, *Business Organizations, Antitrust Laws and Trade Regulation,* § 6.01[2] (1981); *H & B Equipment Co.* v. *International Harvester Co.,* 577 F.2d 239, 244 (5th Cir. 1978); *Greenville Publishing Co.* v. *Daily Reflector, Inc.,* 496 F.2d 391, 399-400 (4th Cir. 1974). Since James' and Hardin's acts in this case were concededly motivated by their "independent personal stake" in pleasing their true employers, M&M/ITT and Hartford, *see Greenville Publishing Co., supra,* 496 F.2d at 399, either James or Hardin was capable of conspiring with ASME. Logic and precedent suggest that if James or Hardin had sufficiently independent motivation to conspire with ASME, they could not *simultaneously and by the same act* cause ASME to conspire with them; otherwise, a single person acting alone could create a multi-party antitrust conspiracy. Yet, this is precisely the result actually reached in this case, where the panel affirmed the finding that ASME conspired with M&M/ITT and Hartford solely on the basis of acts by individuals whose only intent was to benefit those corporations.

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* In any event, as previously demonstrated, ASME Br. 29-30, there was no direct reliance in this case.

In sum, neither precedent nor logic supports the panel's ruling, as Hydrolevel and the Government implicitly admit by emphasizing issues the panel avoided rather than the one it decided.* The panel's decision should be reversed and, at a minimum, the case should be remanded for consideration under the appropriate standard.

B. Neither "Actual Authority" Nor "Ratification" Theories Support the Panel's Opinion.

The principal argument of both Hydrolevel's and the Government's briefs are that ASME was bound by James' and Hardin's acts under a theory of "actual authority," H. Br. 23-33; Gov't Br. 16-21, or that ASME somehow "ratified and affirmed" the anticompetitive conduct of Hardin and James. H. Br. 33-34. The Court of Appeals, of course, expressly declined to reach these issues, A-13, and the issues are thus not before the Court. Since neither the "actual authority" nor the "ratification" theory has the slightest support in the record, however, and since analysis of the law governing those questions further illustrates the panel's error in adopting an "apparent authority" standard, they will be briefly discussed here.

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* The Government's present contention that an intent to benefit the principal is unnecessary in antitrust cases is diametrically inconsistent with the position it has heretofore taken. In the formal text of remarks by the Assistant Attorney General in charge of the Antitrust Division, delivered on May 31, 1979, the principal spokesman for the Government on antitrust issues stated that a corporation is liable "for the acts of its employees and agents when those acts are undertaken for the benefit of the corporation. . . ." Shenefield, "Compliance Programs As Viewed From The Antitrust Division," *reprinted in* 1979 *Trade Reg. Rep.* ¶ 50,403, at p. 55,899. Similarly, in *United States* v. *Koppers Co.*, 652 F.2d 290 (2d Cir. 1981), the Government defended a jury charge that "a corporation is legally bound by the acts and statements of its agents done on behalf and to the benefit of the corporation and directly related to performance of the duties the employee has authority to perform." *Id.* at 298. In a brief signed by the Assistant Attorney General in charge of Antitrust Division, the Government stated that these were "familiar and established principles." *See United States* v. *Koppers Co.*, Dkt. No. 80-1362, Government's Brief at 25. The Government appears to have created the position set forth in its *amicus* brief uniquely for this case.

1. *Actual Authority.* The thrust of both the Government's and Hydrolevel's briefs is that under the principle of *respondeat superior,* governing the relationship of master and servant in tort actions, ASME should be liable for James' and Hardin's anticompetitive acts. While both Hydrolevel and the Government concede that this approach requires a showing that the agent intended to benefit the principal, *see* H. Br. 27; Gov't Br. 19, they argue that because James and Hardin each "performed the very function that was delegated to him under ASME's constitution and regulations," Gov't Br. 20 at n.15, the drafting and release of the April 1971 letter somehow served the interest of ASME. This analysis fundamentally misstates the law and is contrary to common sense.*

The principle of *respondeat superior* is that "a master is subject to liability for the torts of his servants committed *while acting in the scope of their employment.*" *See Restatement* § 219(1) (emphasis added). As the Comment to this Section states, the "conception of the master's liability to third persons appears to be an outgrowth of the idea that within the time of service, the master can exercise control over the physical activities of the servant." *Id.* at Comment a. Precisely because the master cannot "control" the activities of an agent who actively intends to deceive him or attempts to misuse his authority for the benefit of another, Section 235 of the *Restatement* provides that a servant's act "is not within the scope of employment if it is done with no intention to perform it as a

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* Moreover, this analysis is unsupported by the facts. In connection with the issuance of the April 29, 1971 letter, James had no authority or responsibility in the code interpretation process, and his acts (drafting the "loaded" inquiry letter and contriving to obtain a response suitable for misuse by M&M/ITT) did not even purport to be under any color of authority of "ASME's constitution and regulations." Rather, James was acting secretly and behind the scenes, utilizing his knowledge of ASME's procedures to benefit his employer. Indeed, the panel's discussion of ASME's liability referred exclusively to Hardin's activities, *see* A-12 to A-19. Even here, the record is clear that he had no actual authority to issue a letter which addressed the acceptability under ASME standards of any proprietary device. *See* ASME Br. 6-7, 12 at n.; AX V. 191-92; App. 732-33.

part of or incident to a service on account of which he is employed."* Furthermore, the first Comment on this key provision expressly rejects the reasoning adopted Hydrolevel and the Government:

> "The rule stated in this Section applies although the servant would be authorized to do the very act done if it were done for the purpose of serving the master, and *although outwardly the act appears to be done on the master's account. It is the state of the servant's mind which is material.*"

Restatement § 235, Comment a (emphasis added).** Merely because James and Hardin purported or outwardly appeared to be carrying out the duties of volunteer members in "responding" to M&M's staged request is thus irrelevant; the pertinent question is whether in so doing—that is, in secretly skewing the question and response to be useful for M&M's commerical purposes—they had any design to benefit ASME. The record is simply barren of any evidence that they had any

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* Section 235 thus emphasizes that an agent's intent to benefit his principal is a fundamental part of the doctrine of *respondeat superior.* The rhetorical assertion of both the Government, Gov't Br. 25-26, and Hydrolevel, H. Br. 41, that ASME is seeking "an exemption from traditional principles of *respondeat superior*" is thus backwards: ASME has simply tried to apply *respondeat superior* principles to this case; the panel's opinion—and Hydrolevel's new-found position in this Court—are based on an exception to those principles.

** *See also Restatement* § 231, Comment a, regarding "criminal or tortious acts," which provides:

> "The fact that the servant intends a crime, especially if the crime is of some magnitude, is considered in determining whether or not the act is within the employment, since the master is not responsible for acts which are clearly inappropriate to or unforseeable in the accomplishment of the authorized result. The master can reasonably anticipate that servants may commit minor crimes in the prosecution of the business, but serious crimes are not only unexpectable but in general are in nature different from what servants in a lawful occupation are expected to do."

such intent.* Moreover, since ASME logically could not benefit from an improper interpretation of its own Code, there was no circumstantial basis for an inference that either James or Hardin had such a purpose. *See* ASME Br. 39-41. This is a case where "the facts may indicate that the servant is merely using the opportunity afforded by the circumstances to do the harm," *Restatement* § 235, Comment c, for which the principal is not liable.**

Hydrolevel's further reliance on the theory that an agent can act for, and thus serve, two masters, *see* H. Br. 27, is similarly inapplicable. While *Restatement* § 226 states that an agent "may be the servant of two masters . . . if the service to one does not involve abandonment of the service to the other" and while Section 236 provides that an agent's conduct may be "actuated by dual purpose," the commentary and examples under these sections support ASME's position. The *Restatement* requires that if an agent simultaneously binds two masters, his acts must be "within the scope of his employment for both," *Restatement* § 226, Comment a, thus requiring, under Section 235, that he intend to benefit both. Furthermore, the

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* For this reason, the Government's heavy reliance, Gov't Br. 13-14, 18, on *New York Central & Hudson River R.R.* v. *United States*, 212 U.S. 481 (1909), is misplaced. *See also* H. Br. 27. In that case, which involved the constitutionality of imposition by the Elkins Act of liability on a common carrier for acts of its agents, this Court expressly noted that liability may be imputed to the principal "because the act is done for the benefit of the principal . . . ." (*id.* at 493) and that it is "the corporation, which profits by the transaction . . . ." *Id.* at 495; *see also* ASME Br. 33-35.

** Hydrolevel's discussion ignores Section 235, which compels reversal, and focuses on Section 282. H. Br. 28-31. This emphasis is misplaced. Section 282 deals with formal "notice" given to a principal through his agent. The introductory remark to the chapter is careful to note that intent to benefit the principal is unnecessary only "in the case of contracts and conveyances;" where the issue is the principal's liability in tort, "[t]he principal is not liable *unless the agent was authorized and intended to act in part, at least, for the principal's benefit, or unless the principal in some way benefited from the transaction.* For these reasons it is necessary to deal with the two situations separately." *Restatement* at p. 581 (emphasis added).

same Comment emphasizes that the agent cannot "be a servant of two masters in doing an act as to which an intent to serve one necessarily excludes an intent to serve the other." The illustrations given thereafter—and particularly Illustration Number 3—show that the drafters of the *Restatement* did not mean to allow a dishonest agent to serve a true principal who benefits from an intentionally deceitful exercise of the agent's responsibilities, and at the same time to bind the principal who is thereby being deceived.

Similarly, Hydrolevel's attempts to rely on so-called "judicial admissions" by ASME that James and Hardin were acting on its behalf, H. Br. 31-32, *see also* Gov't Br. 20, n.15, amount to capitalizing on the thoroughness of James' and Hardin's deceit. The April 29, 1971 letter was issued by ASME in the normal course of its activities precisely because James and Hardin secretly and skillfully concocted a deliberately artificial request letter and a technically accurate response, *neither of which mentioned Hydrolevel in any way,* but which were ultimately designed to be misused by M&M for its own purposes. The fact that James and Hardin successfully manipulated ASME's procedures to accomplish their scheme is in itself no more relevant in determining ASME's knowledge and intent than if they had been bribed or coerced to do so, or if they had stolen ASME's stationery and issued the letter themselves: since they did not intend to benefit ASME, under normal principles of *respondeat superior* ASME is not liable for their acts.*

2. ***Ratification.*** Hydrolevel alternatively argues that ASME's acts after M&M's misuse of the April 29, 1971 letter was brought to its attention constituted a "ratification" or "approval" of James' and Hardin's anticompetitive acts. H. Br. 33-34. The Court of Appeals not only formally declined to resolve this question, *see* A-13, but expressly stated that

* Note, however, that under the Court of Appeals' "apparent authority" theory, if a member of a voluntary organization were bribed or coerced to commit an unlawful act, the organization would be bound if the act was within the scope of the member's "apparent authority."

ASME's participation in the alleged conspiracy—even under an erroneous "apparent authority" theory—ended with the issuance of the June 9, 1972 letter. A-23. Hydrolevel's argument has thus already been indirectly, but quite emphatically, rejected by the Court of Appeals.*

At any rate, Hydrolevel's arguments in support of its ratification theory are absurd. As ASME's statement of facts demonstrates, *see* ASME Br. 10-12, ASME's reaction to Hydrolevel's complaint about the April 29, 1971 letter was the antithesis of a "ratification," an "approval," or a "cover-up". Rather than hiding the event from public view, the entire matter was put on the agenda for the next meeting of the B-PV Committee, to which Hydrolevel was specifically invited, and was openly discussed at a public meeting attended by literally hundreds of mechanical engineers from all segments of the profession. Furthermore, the June 9, 1972 letter directly responded to Hydrolevel's request for a "correcting statement." J.A. 73. While Hydrolevel now claims that the June 9 letter was "vague and ambiguous," and "confirmed the intent of the entire earlier letter," H. Br. 34, this is simply not true, as the operative language of the June 9 letter emphasizes: "This will advise that there is no intent in Section 4 to prohibit the use of low water fuel cut-offs having time delays in order to meet the requirements of Par. H.G. 605(a)." J.A. 84. Hydrolevel's present quibbling over the wording of the letter is refuted by the written statement of its President, very shortly after the June 9, 1972 letter was issued, expressing total satisfaction with it, and conceding that the letter "clearly removes any objection against the use of time delays with low water fuel cut-offs." AX V. 78-79; *see also* A-24.**

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* Hydrolevel chides ASME for devoting "only four sentences" to the issue of ratification. H. Br. 33-34. Since the issue was not decided by the Court of Appeals, was indirectly rejected by it, and was not raised in ASME's petition, Hydrolevel's remark is nonsensical.

** Hydrolevel does not respond to ASME's demonstration, ASME Br. 12, that Hydrolevel could have sought further review of the June 9 letter, and chose not to do so.

Similarly, Hydrolevel's claims that ASME failed to disavow the acts of James or Hardin in 1971 or 1972, H. Br. 8-12, 33-34, and its assertion that ASME's investigation of the matter was somehow inadequate, H. Br. 12-14, 34; *see also* Gov't Br. 28, n.22, simply ignore the extent of James' duplicity. Until the time of his testimony under oath before the Senate Judiciary Committee in 1975, James hid from ASME and from everyone else the fact that he had participated in drafting the April 12, 1971 inquiry letter and that he had destroyed his copies of the drafts. It is small wonder—and certainly not a basis upon which to find ASME liable for antitrust damages caused by a letter issued three years earlier—that in 1974, at a time when James still hid from ASME and others the true nature of his role, ASME's Professional Practice Committee was unable to discover the true facts.* Hydrolevel's claim that the very success of James' duplicity somehow binds ASME makes no sense and has no support in law.

POINT II

THE COURT OF APPEALS ERRED IN UPHOLDING ANTITRUST LIABILITY ON THE BASIS OF NEGLIGENT "UNINTENTIONAL PARTICIPATION" IN AN ANTITRUST CONSPIRACY

As Point I of this brief emphasizes, a theory of "apparent authority" without requiring that the agent intends to benefit the principal does not appropriately apply to antitrust actions and cannot be used—as the Court of Appeals used it—as the exclusive basis upon which to link an otherwise unwitting organization with an antitrust conspiracy. In Point II of our main brief, we pointed out that the panel's holding in effect

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* Needless to say, ASME was also unaware until after litigation commenced of M&M/ITT's internal files detailing the company's appreciation of James' anticompetitive acts. *See* H. Br. 2-3; Gov't Br. 5. This evidence and other evidence like it showing the deceitfulness of James and his employer are obviously irrelevant in assessing *ASME's* knowledge or intent, the only issue in this case.

eliminated the requirement, long recognized by this Court, *see* ASME Br. 36-38, that a defendant must have been an active and knowing participant in a conspiracy in order for it to be liable under the antitrust laws. Acknowledging that its holding amounted to finding ASME liable for "unintentional participation" in the conspiracy, A-26, the panel's opinion, in essence, embraced a theory of negligence based on ASME's alleged failure to supervise the acts of its members.

Neither Hydrolevel nor the Government addresses or responds to Point II of our brief. Nonetheless, the Government does claim that a "careful and objective check by another Subcommittee member familiar with the relevant provision of the Code would have revealed the deliberate error introduced in the draft response by Hardin and James." Gov't Br. 28. From this, the Government argues that agency principles should be so construed that "imposition of liability on code-making bodies such as ASME . . . will encourage the adoption of procedural safeguards to prevent such abuses." *Id.* at 26-27. The Government thus candidly acknowledges that the ultimate rationale of the panel's opinion is a negligence theory. As this Court has recently held, however, when Congress intended to premise liability on negligence, "it said so expressly and subjected such actions to procedural restraints . . ." *Aaron* v. *Securities and Exchange Commission,* 446 U.S. 680, 690 (1980), *see also Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 206-07 (1976).*

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* The Government's argument that "a careful and objective check" of the April 29, 1971 letter would have revealed James' and Hardin's scheme, Gov't Br. 28, is also blind to the facts. The April 29, 1971 letter was pernicious precisely because it was a technically accurate response to the extremely limited—and secretly contrived—question to which it responded. *See* ASME Br. 8, 37, n. If a low-water fuel cut-off operated after the water fell below the required point, the cut-off would not meet the Code, which clearly (and with good reason) requires that a cut-off operate before the water falls below the danger point. Since M&M's "loaded" question was couched in terms of a cut-off that operated *after* the danger point had been passed, the response that such a cut-off would be inadequate was in itself correct, and no "objective check" of the response—which, like the question, did not mention or refer to Hydrolevel in any way—could have foreseen the

In any event, since the extent of ASME's negligence was at most its failure to monitor volunteer personnel, for reasons already discussed, *see* pp. 2-4, 10, 13, *supra*, this omission cannot be the basis for "knowing or intentional misconduct." Accordingly, the panel's legal conclusion that ASME is liable for negligent or "unintentional participation" in an antitrust conspiracy should be reversed and, for the reasons demonstrated in Point II of ASME's main brief, the complaint should be dismissed.

POINT III

THE PANEL'S DECISION IS ALSO WRONG AS A MATTER OF POLICY AND WILL HAVE A DISASTROUS EFFECT ON MANY VOLUNTARY ORGANIZATIONS WHICH SERVICE THE PUBLIC INTEREST

In the final portion of their briefs, Hydrolevel and the Government argue that the policies underlying the antitrust laws require that this Court affirm the decision of the Court of Appeals. These policy arguments misconstrue ASME's arguments and the facts of this case, and should be rejected.

Hydrolevel and the Government begin by asserting that ASME seeks "immunity" (*see, e.g.*, H. Br. 44; Gov't Br. 26, 27, n.21) from the antitrust laws or an "exemption" (H. Br. 41, 44, 48-49; Gov't Br. 25-26, 30, n.25) from the principles of *respondeat superior*. This is simply not so. As expressly stated in ASME's principal brief, at 46 (footnote omitted):

> "We do not argue that non-profit, voluntary associations, such as ASME should be immune from antitrust liability;

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misuse to which the secret conspirators would put the letter. Furthermore, as also demonstrated at ASME Br. 37, n., there *was* an "objective check" of the letter by both the Chairman and the Vice-Chairman of the B-PV committee, two individuals having nothing to do with M&M or Hartford and whom Hydrolevel has never claimed to be part of the alleged conspiracy. They obviously did not and could not see the evil hidden in the letter because the letter was capable of ill effect only when subsequently misused by M&M. *See* ASME Br. 9-10.

> we suggest only that holding such an organization strictly liable in treble damages for the unauthorized and unratified acts of volunteer members, that are not taken in furtherance of the organization's objectives or otherwise to benefit the organization, is unprecedented as a matter of law and unwise as a matter of policy."

Moreover, rather than seeking "an exception from the traditional principles of *respondeat superior*" (Gov't Br. 25-26; *see also* H. Br. 41), the thrust of our argument has been that *respondeat superior* (which includes the requirement of an intent to benefit the principal) should govern this case and requires reversal. It is the panel, not ASME, that rejected "the appropriate theory for conventional torts," A-13, and reached out, without the benefit of any briefing on the question, for an exceptional theory of vicarious liability that amounts to holding a voluntary organization strictly liable for the acts of any of its members provided only that the member acted within the broad scope of his "apparent authority."

In part, the Government's position arises from its inaccurate understanding of the facts in this case.* More importantly, however, the Government fundamentally misperceives how ASME (or any voluntary standards organization) works. *See*

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* Contrary to the panel's conclusion that James and Hardin were able "to rule dispositively on the fitness of a competitor's product," A-16, *see, e.g.*, Gov't Br. 26, the April 29 letter did not even mention Hydrolevel or its device. To the extent that the letter had any adverse effects on Hydrolevel's fortunes, this was solely because M&M (concededly without ASME's knowledge) misrepresented the letter as barring Hydrolevel's product. Furthermore, the Government's claim that ASME issued the letter "without providing procedures to ensure accuracy and fairness," Gov't Br. 32, n.26, *see also id.* at 28, is also mistaken. As previously demonstrated, *see* ASME Br. 8-12, 37, n.*, and pp. 19, 21-22, n., *supra*, the letter was reviewed by two committeemen having no relationship to Hydrolevel or its competitors; as soon as Hydrolevel complained of the letter, it was discussed at a public meeting to which Hydrolevel was invited; ASME thereafter issued a letter specifically stating that a time delay feature did not violate ASME's Code; and Hydrolevel expressly acknowledged its satisfaction with the June 9 letter.

generally Hamilton, "The Role of Nongovernmental Standards in the Development of Mandatory Standards Affecting Safety or Health," 56 *Texas L. Rev.* 1329-1484 (1978), for a detailed discussion of voluntary standards organizations. For example, the Government argues that affirmance is necessary because ASME "otherwise would wield essentially legislative powers without check by public authority. . . ." Gov't Br. 31.* This is simply wrong. As set forth in our main brief, pp. 2-3, ASME's many codes are voluntary; that is, they have no independent force or effect, do not bind any manufacturer or distributor, and are purely advisory in nature. What gives them economic vitality is the fact that numerous regulatory jurisdictions, including the federal government, have determined to adopt ASME's codes as part of *their* regulatory framework.** This is quite different from the situation where a group of private business concerns jointly determine to boycott a particular product because it does not meet their self-imposed standards of quality. *Compare Radiant Burners, Inc.* v. *People's Gas, Light & Coke Co.*, 364 U.S. 656 (1961); *Silver* v. *New York Stock Exchange, Inc.*, 373 U.S. 341 (1963). Contrary to the Government's assertion, the "public authorities" have every opportunity to "check" the appropriateness of ASME's codes and the fitness of ASME's procedures and are under no obligation to adopt or continue to use the codes if they are dissatisfied with them.***

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* Similarly, Hydrolevel mistakenly argues that organizations like ASME "exercise regulatory power over a client industry," H. Br. 46, and even includes in its Point III caption the hyperbolic claim that this case involves "Private Groups That Exercise Unregulated Power Over The Economic Freedom of Others . . . ." H. Br. 41.

** In fact, the federal government not only adopts and enforces ASME codes as federal regulations, but participates in ASME's codes and standards activities by authorizing government employees to serve on ASME committees; indeed, the federal government has expressly requested that ASME develop new codes to cover areas perceived to need such safety standards. *See, e.g.*, App. 613-22.

*** In addition, the Government's heavy reliance on *Radiant Burners* and *Silver* (Gov't Br. 31, n.26, 32, n.27), ignores the procedural safeguards

ASME's codes enjoy widespread recognition precisely because the federal government and many state and local governments have approved both its standards and the procedures used in adopting them. But for the activities of ASME and similar voluntary standards organizations (many of which have filed *amicus* briefs herein), these governmental entities would themselves be required to develop and coordinate among themselves uniform standards for industry and commerce, all at enormous additional public expense and bureaucratic complexity.* *See* ASME Br. 43-44. It is clear, therefore, that these organizations perform vital functions in the public interest, and we strenuously question the view that responsible antitrust policy requires that such organizations be held liable for three times the damages caused by each of their alleged co-conspirators where the sole basis of their "participation" in a conspiracy is the secret and disloyal acts of a member whose only interest was to benefit himself or another.

As the Government recognizes, the purpose of the treble damage remedy is to "deter violators." Gov't Br. 29. In the context of an antitrust conspiracy, a violator is one who

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that ASME maintained at the time of the issuance of the letter in question, including: (1) full B-PV Committee review and approval of any "official" decision; (2) procedures against the issuance of any interpretation addressing the acceptability of a particular device or design, which instead were referred to an umbrella group of governmental regulatory authorities responsible for enforcing the Code for a response; and (3) "due process" appeal procedures. *See* ASME Br. 6-7, 10-12. Furthermore, such procedural safeguards have undergone continual tightening and improvement over the past decade. However, the point here is that no set of safeguards can insure that a non-profit, voluntary membership organization will not be victimized by a disloyal member familiar with its procedures or, for that matter, under the panel's standard, by a volunteer possessing a piece of official stationery and the guile to misuse it with an outward appearance of authority. *See* ASME Br. 45-46.

* Interestingly, if federal or state governmental agencies were to fulfill these functions directly instead of relying on organizations like ASME, standards-setting activities would be immune from accountability under the antitrust laws. *Cf. Parker* v. *Brown*, 317 U.S. 341 (1943).

intentionally participates in an agreement or combination with knowledge of at least some of the conspiracy's illicit goals. *See* pp. 2-4, 10 at n., 20-22, *supra*. Hydrolevel plainly named M&M/ITT and Hartford as defendants in this suit on the theory that James and Hardin were serving M&M/ITT and Hartford and that their actions made those companies "violators" of the antitrust laws. Since James and Hardin intended to benefit their employers, those companies—which have settled the antitrust allegations against them—were obviously bound by their acts. Neither Hydrolevel nor the Government, however, has provided a rational basis for their assertion that James' and Hardin's acts also establish ASME's knowledge and conspiratorial intent.

It is not enough simply to argue that punitive measures are necessary as incentives to encourage more thorough monitoring or better procedures; this may justify the imposition of ordinary tort liability upon a negligent defendant,* but it has no bearing on determining whether there was intentional misconduct. Nor is it relevant that in this instance an employee of a competitor of Hydrolevel was in a position to manipulate ASME's procedures, unless the record demonstrates that ASME intentionally placed him in such a position for that purpose. As emphasized in ASME's main brief, this Court and the federal courts have long tolerated, and even encouraged, joint action among competitors in true trade associations, unless the facts show that the intent or purpose of the combination was to restrain trade. ASME Br. 40-41. ASME is not

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* The panel in this case concluded that Hydrolevel could successfully have sued ASME for common law and statutory torts. A-15, n.5. As the panel also noted, Hydrolevel initially included such allegations in its complaint against ASME but "abandoned all of its state law claims at trial." *Id.* Hydrolevel's assertion that it will be remediless if the judgment against ASME is not upheld, H. Br. 49, thus ignores the facts that it settled its suit against the only organizations that benefited from the wrongdoing and that it deliberately chose to base all of its claims against ASME on antitrust allegations, foresaking tort remedies in the hope of a treble damage recovery.

even a trade association,* and there is nothing in the record to even suggest that its purpose or intent in placing James and Hardin on the Section IV Subcommittee was to enable them to launch anticompetitive schemes against competitors of their respective employers. Rather, everything in the record suggests that, other than James and Hardin, no one associated with ASME had any knowledge whatsoever of their nefarious scheme until many months after it was in motion.

Hydrolevel attempts to distort these facts by quoting selectively and at length from Bruce Sinclair's *A Centennial History of the American Society of Mechanical Engineers, 1880-1980* (Univ. of Toronto Press 1980). H. Br. 42-44. While Hydrolevel notes at the outset of this discussion that *"Centennial* chronicles how, *in its early years,* the ASME had been dominated by a small group . . .," H. Br. 42 (emphasis added), it later attempts to apply the *Centennial* history "to the present." H. Br. 43. This ignores not only the clear pre-World War II context of the cited portions of *Centennial,* but the documented fact the procedures of voluntary standardization changed markedly after World War II, *see* Hamilton, *supra,* 56 *Texas L. Rev.* at 1369-71, when "the principal standards-setting organizations took steps designed to broaden the interests represented in the standards-setting process," *id.* at 1370, and American National Standards "due process" procedures were adopted by standards writing organizations. *Id.* at 1346; *see generally id.* at 1341-49.**

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* While some of its individual members come from the manufacturing sector, the rest come from academia, other scientific institutions, insurers, consumer groups and federal and state regulatory agencies. *See* ASME Br. 3.

** Hydrolevel also argues that "only the 'major firms' with an interest in the Code could afford to donate large amounts of engineering talent to code development work." H. Br. 43-44. This is not only contrary to the fact that, much as in bar association work, engineers from all segments of the profession donate their time to professional association activities, but conveniently ignores the uncontroverted evidence in this case that an employee of Hydrolevel, a firm that "never at any time reached 1% of the market," A-22, served as a member of an ASME Committee with oversight responsibility for the low-water cut-off safety device here at issue. *See* App. 651-54.

If ASME is liable for treble damages solely because two of its many thousands of members were able in this instance to secretly manipulate its procedures, every public interest membership association in the country will be vulnerable to such suits and, in the rare but inevitable instances where such deceit is successful, to astronomical money judgments. At a time when the Government is cutting back on its activities and urging greater reliance on the voluntary sector, the ultimate loser would be the public.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit should be reversed and the complaint dismissed; at a minimum, the case should be remanded for reconsideration under the proper standards.

Dated: January 5, 1982

Respectfully submitted,

HAROLD R. TYLER, JR.
Attorney for the American Society of Mechanical Engineers, Inc.
30 Rockefeller Plaza
New York, New York 10112
(212) 541-4000

Of Counsel:

RICHARD D. PARSONS
FREDERICK T. DAVIS
STEVEN C. CHAREN

PATTERSON, BELKNAP, WEBB & TYLER
30 Rockefeller Plaza
New York, New York 10112

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No. 80-1765

IN THE

SUPREME COURT OF THE UNITED STATES

October Term. 1981

THE AMERICAN SOCIETY OF
MECHANICAL ENGINEERS, INC.,
Petitioner,

v.

HYDROLEVEL CORPORATION,
Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF ADOLPH J. ACKERMAN, AMICUS CURIAE

ADOLPH J. ACKERMAN
Consulting Engineer
1250 Sherman Avenue
Madison, Wisconsin 53703

Of Counsel
Henry A. Field, Jr.
Boardman, Suhr, Curry & Field
1 South Pinckney Street
Madison, Wisconsin 53701

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF ADOLPH J. ACKERMAN

Pursuant to Rule 36(1) of the Rules of the Court, Adolph J. Ackerman, an independent Consulting Engineer with more than 50 years of active practice in his profession, is offering his brief as *amicus curiae,* out of a sense of duty to assist the Court in the analysis and interpretation of some highly complex professional responsibilities so that the Court will reach a decision which will serve the best interests of our country.

Amicus Curiae, since 1949 a member of the American Society of Mechanical Engineers (ASME),

the petitioner, is deeply concerned about the issues raised in this case, and about the final outcome. At stake is the high stature of one of America's most important Societies in the engineering profession, along with the continuing trust and confidence of the public in that Society.

This high stature and trust has been earned during the past century by demonstrating exceptionally high leadership in engineering responsibility and professional ethics in the field of mechanical engineering and in defense of public safety.

Amicus curiae proposes to file a brief to identify these ethical commitments and professional responsibilities of ASME members, which he believes have not been adequately identified to the Court. On this basis *amicus curiae* has petitioned the President of ASME to grant his consent on behalf of the Society, but to date this has not been received. A copy of the request to the President of ASME has been filed with the Clerk of the Court, and this Motion is being offered to permit the timely filing of the *amicus curiae* brief.

Consent of the respondent, Hydrolevel Corporation, has been received and a copy is also being filed with the Clerk of the Court.

Dated this 20th day of October, 1981.

Adolph J. Ackerman
Consulting Engineer
1250 Sherman Avenue
Madison, Wisconsin 53703

Henry A. Field, Jr. Esq.
1 South Pinckney Street
Madison, Wisconsin 53701

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CITATIONS

1. "America's Abundant Electricity and the ASME Boiler Code." Adolph J. Ackerman, Member IEEE and ASME, IEEE TRANSACTIONS-AES, Vol. AES-15, No. 6, Nov. 1979, David B. Dobson, Admin. Editor.

2. "Slow Death of a Free Profession," Adolph J. Ackerman, IEEE TRANSACTIONS-AES, Vol. AES-7, No. 3, May 1971; and "Using Engineering to Enslave You," Adolph J. Ackerman, CIVIL ENGINEERING-ASCE, Vol. 34, No. 7, July 1964.

3. Earl Warren, Chief Justice, Address to the Louis Marshall Dinner of the Jewish Theological Seminary of America, New York, N.Y., Nov. 12, 1962.

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Pursuant to Rule 36 (1) of the Rules of the Court, Adolph J. Ackerman, an independent Consulting Engineer with more than 50 years of active practice in his profession, submits this brief as *amicus curiae*, out of a sense of duty to assist the Court in the analysis and interpretation of some highly complex professional responsibilities so that the Court will reach a decision which will serve the best interest of our country. (Appendix A)

INTEREST OF *AMICUS CURIAE*

This brief is offered as a voluntary contribution, based on *amicus curiae's* knowledge and experiences on the questions placed before the Court. It is offered in compliance with the personalized professional responsibilities of an engineer and in compliance with his ethical obligations which have so notably been identified by a former Chief Justice, as restated later in this brief.

Although *amicus curiae* has attempted to present to the Court his judgment, and his ethical commitments to the public interest, by first reviewing the total documentation before the Supreme Court, the rules of the Court have prevented this because they require a filing not later than the Respondent's brief.

It is recognized that the legal concept of responsibility and liability of a professional society, as stated in the decision of the Court of Appeals, is being viewed with deep concern by many service organizations who rely for their functioning on the voluntary assistance and support of the members. But in the practice of the engineering profession there must be legal standards of responsibility by which to fairly evaluate successes, or fairly punish deficiencies and failures.

In this "Hydrolevel case" the lower courts found that there was a failure on the part of the American Society of Mechanical Engineers (ASME) to perform within the bounds of the law, and they granted a financial award to Hydrolevel. Under such circumstances it is within the resources of the Society's Governors to meet its obligations through an assessment on the members. In this way the consequences of a failure in administration can readily be met and effectively communicated to the members.

QUESTIONS PRESENTED BY THE PETITIONER

1. Whether a nonprofit, voluntary membership organization may be found liable for "unintentional participation" in a conspiracy to restrain trade and to monopolize, in violation of Sections 1 and 2 of the Sherman Act, on a theory of negligence.

2. Whether a nonprofit, voluntary membership organization is strictly liable under the antitrust laws for all acts of its volunteer members within the scope of their "apparent authority," when (a) the acts were neither authorized nor ratified by the organization, (b) the members did not intend to and did not in fact, benefit the organization by their actions, and (c) the members actively deceived the organization for their own purposes and benefit.

SUMMARY OF ARGUMENT

The issue in this case relates to a branch of engineering for public safety which is uniquely associated with the American Society of Mechanical Engineers (ASME), and with no other branch of engineering and with no other professional society. This branch relates to the design, fabrication, and operation of steam boilers under high pressures and temperatures, and to the related appurtenances and devices designed to safeguard against explosions.

This branch of engineering and the great resource of experienced manpower have grown up during the past six decades through the development and application of engineering standards which became known as the ASME Boiler Code, and in close collaboration with an insurance company which has been willing to write 100% insurance protection against explosions of boilers which comply with this Code.

The present case has arisen out of the collusive mal-administration of this Code to the advantage of one manufacturer of a safety device for steam boilers, and to the injury of another. In view of the great responsibilities for the public safety involved in the administration of the ASME Boiler Code, the court must consider what effect this case will have in strengthening the Society's administrative structure for the safety of future generations.

ARGUMENT

HISTORICAL BACKGROUND

The petitioner in this case is The American Society of Mechanical Engineers (ASME), a nonprofit engineering society founded in 1880 for the purpose of enhancing the use of mechanical engineering in the public interest. The respondent is Hydrolevel Corporation, now defunct, which undertook to manufacture a "low-water fuel cut-off valve" in compliance with the technical and operating standards established in the ASME Boiler Code and in competition with a similar device which for many years had been manufactured by McDonnell & Miller, Inc. (M&M).

Petitioner is challenging the decision of the Second Circuit Court of Appeals in the case known as Hydrolevel Corporation v. The American Society of Mechanical Engineers, Inc., 635 F.2d 118 (2d Cir. 1980). This court held that nonprofit voluntary associations are liable under the federal antitrust laws for the improper and unauthorized acts of their volunteer members who have "apparent authority."

The case is focused on the improper issuance and subsequent misuse of a single letter, written by a volunteer member of ASME interpreting an ASME standard of performance, to the disadvantage of

Hydrolevel. Subsequently, Hydrolevel was driven into bankruptcy. The misconduct is focused chiefly on two members of ASME, who served in a volunteer capacity as Chairman and Vice Chairman, respectively, on one of the important subcommittees in the administration of the ASME Boiler Code. The possibility of their conflict of interests was indicated in their respective employment capacities, one as Vice President of M&M and the other as Executive Vice President of Hartford Steam Boiler Inspection and Insurance Company.

On August 19, 1975, Hydrolevel filed this suit in the United States District Court for the Eastern District of New York against ASME and two co-defendants: The International Telephone & Telegraph Company (ITT) which had purchased M&M in December 1971, and against Hartford Steam and Boiler Inspection and Insurance Company. Prior to trial, ITT and Hartford settled the charges against them for $725,000 and $75,000, respectively, and an amended complaint was filed naming ASME as the sole defendant. (This indication of an admission of guilt by the two former co-defendants has not been explained in the present record.)

The petitioner's attorney presents comprehensive legal citations in support of ASME, but erected on a narrow base of legal citations and devoid of the ethical obligations which serve as the foundation of ASME's professional responsibilities and of the public's confidence in ASME.

It is argued that:

> "Plenary review of this case should be granted because it raises novel and major issues of interpretation of the Sherman Act relative to the liability exposure of nonprofit, voluntary professional organizations for the unauthorized acts of their members. ... The case before the Court is an appropriate one under its clear

> facts to enable the Court to provide guidance for nonprofit voluntary member organizations in their future activities in the developments and application of technical codes and standards. ... The Court is called upon to 'resolve the important issue of organization liability for self-serving acts of its volunteer members serving on committees which carry out functions of the organization.'"
>
> — Brief *Amicus curaie* of The National Society of Professional Engineers

ASME'S GREAT ACHIEVEMENT

It is claimed that the technological progress of the United States in the past hundred years, or more, has rested in substantial part on the development and use of the voluntary standards system. But this broad generalization is quite different from the remarkable progress achieved under the ASME Boiler Code, combined with 100% insurance coverage against explosion of boilers which comply with the Code in their manufacture and operation.

In view of the success of this unique joint venture with an insurance company a brief review of its origin and historical development is warranted.[1] The story begins back in 1866 when Jeremiah Merwin Allen, then Steward of the American School for the Deaf in Hartford, Connecticut, founded the first boiler insurance company in America, The Hartford Steam Boiler Inspection and Insurance Company. This was patterned, in part, after a similar company established in 1858 in England. During the first fifty years the

[1] "America's Abundant Electricity and the ASME Boiler Code." Adolph J. Ackerman, Member IEEE and ASME, IEEE TRANSACTIONS-AES, Vol. AES-15, No. 6, Nov. 1979, David B. Dobson, Admin. Editor.

company's growth was very slow, whereas the use of steam power was growing rapidly.

Across the nation there were thousands of steam boilers and steam engines in the small factories, and there were the steam boilers in the railroad locomotives, threshing machines, river steamboats, harbor tugboats, and in the large steam ships on the ocean. It was the era of steam boilers of all sizes and designed for a wide range of steam pressures. But there were also many failures and explosions of steam boilers. An insurance executive in May 1912 noted: "Every year there occur in the United States between 1300 and 1400 serious boiler accidents, of which 300-400 are violent explosions. These accidents kill between 400 and 500 persons, injure 700-800 more, and destroy vast amounts of property."

Growing public concern and protests motivated the nation's boiler-makers in 1888 to form the American Boiler Manufacturers Association (ABMA). The prime objective of this organization was "... to establish such standards for materials and workmanship as will insure uniform excellence of construction of all American boilers, and thus secure safety to the lives and property of all communities where boilers are used, and to procure the passage of laws making the manufacture, sale, or use of inferior materials, criminal offenses." This reflected the manufacturers' realization of their moral responsibility. However, efforts to have the members of ABMA approve a uniform set of construction rules were not successful, illustrating that, even though the boiler-makers recognized their responsibility, not all of them were willing to abide by a set of voluntary rules.

In 1911, the President of The American Society of Mechanical Engineers, Edward D. Meier, convinced the Society that its reputation and broad scientific interests, which made it commercially disinterested,

should enable it to formulate a set of rules, or a Code, acceptable to the manufacturers and which might be adopted by all the states as a basis of their laws pertaining to boilers and pressure vessels.

The first ASME Code, entitled "The Rules for the Construction of Stationary Boilers and for Allowable Working Pressures," was adopted by the Council of ASME in the Spring of 1915. The committee that formulated these rules subsequently was enlarged and designated as the ASME Boiler Code Committee.

Soon after the introduction of the ASME Boiler Code, various state legislatures proceeded to enact legislation requiring boilers and unfired pressure vessels to be installed and operated under the safety standards of the ASME Boiler Code; administration is in the hands of State Boiler Inspectors.

During the past sixty years the development and application of the ASME Boiler Code has been truly miraculous. Today, the ASME Boiler Code Committee and its many subcommittees provide interpretations, rulings, revisions, and additions to the Code on a wide range of critical details of design, fabrication, riveting, welding, metallurgy of steel and welding rods, inspection, stress relieving, pressure testing, and in-service operation. The two most important factors in this progress have been (1) the nationwide buildup of experienced manpower in engineering and in the manufacture of safe steam boilers, and (2) the parallel growth of the services performed by the Hartford Steam Boiler Inspection and Insurance Company. Hartford engineers have at all times maintained active membership on the ASME Boiler Code Committee.

The Hartford Company relies on close inspection of all details in the fabrication of a boiler and its installation and subsequent operation, all in accordance with the ASME Boiler Code. By this means the

company has developed its confidence to write full insurance coverage against explosions, both for the owner of the boiler and for third parties in the vicinity of a power plant, while maintaining its financial stability. The company offers a remarkable demonstration of what can be achieved under our American system of free enterprise by a few men who are endowed with the basic qualities of integrity, imagination, and initiative in serving the best interests and safety of the public.

When a Hartford shop inspector approves a completed boiler he is authorized to emboss on it the official "ASME emblem for steam boilers" as a certification of compliance with the Boiler Code. Furthermore, with this stamp on a boiler the State Boiler Inspector is authorized to approve the installation and operation of that boiler. As a symbol of public safety this simple ASME stamp has earned for itself a nation wide public trust. Most importantly, the dangers of serious boiler explosions have been reduced to almost zero. The ASME Boiler Code may well be regarded as the greatest achievement in the history of the American engineering profession.

The story of ASME's great contribution to the miracle of America's abundant electricity supply can be communicated most readily in two graphical charts: Appendix B shows the dramatic decline in boiler explosions following the introduction of the ASME Boiler Code in 1920, despite the rapid increase in steam pressures. Appendix C shows the tremendous growth in electric generating plants from 1920 to 1975 primarily through the installation of safe and insurable steam boilers.

From this perspective we can now look back and recognize the exceptional vision and courage of Jeremiah Merwin Allen as the founder of The Hartford

Steam Boiler Inspection and Insurance Company and of ASME's Past-President Edward D. Meier, a great engineering leader with high ethical commitments in defense of public safety.

Edward Meier's greatness is reflected in his address upon assuming the presidency of ASME in 1910, in which he declared:

> "Engineering is the profession of the present, and will dominate the future. The engineer is a devout believer in natural laws. He knows that they are immutable and permit no exceptions. Every infraction of them brings its own punishment. To lie is not only wicked, it is ineffectual, absurd and ridiculous. To tell the truth is not merely laudable and salutary, it is essential and necessary. To men thus trained, the future of the race is to be confided."

The ASME Boiler Code is the Society's most important activity and the only code that has been created as a joint venture of a professional society and of an insurance company. ASME has administered the technology and engineering of insurance coverage. This has grown up as a solid "marriage." Only what ASME has specified in its Code for the design, fabrication, and operation of a boiler, and has been declared insurable by Hartford, may be embossed with the ASME symbol of approval and declared "safe and insurable."

In terms of Hartford's financial responsibility for public safety against damages from explosions, and in association with ASME's services, ASME stands uniquely alone and no other Society offers such a definition of "safety." In the current technological era other Societies, Institutes, and Associations have grown up as imitators of ASME by offering "standards," but without responsibility in the event of failures.

In summary, the ASME Boiler Code occupies a unique position because of the dedicated services by responsible engineers in defense of the public's interest and safety. Of equal importance is the associated financial risk-taking by Hartford.

THE DECLINE OF ENGINEERING RESPONSIBILITY

The regrettable position in which ASME finds itself due to the present litigation is symptomatic of a general decline of the stature of the engineering profession at large, as described more fully in a study "Slow Death of a Free Profession."[2] This is manifesting itself in the censorship of controversial issues in the journals of engineering societies, in the silence of many university faculties of engineering on controversial public issues, in the silencing of "dissent," as acknowledged editorially in "Duty to Dissent" (Appendix A), and in the trend towards "freedom from responsibility."

In contrast with the aggressive initiative in defense of public safety, as was demonstrated in earlier times by ASME's distinguished leaders in the adoption and implementation of the ASME Boiler Code, the current retreat from personalized professional responsibility in engineering is one of the great tragedies of this century.

This retreat is further indicated in ASME's current petition for a Writ of Certiorari. ASME mobilized the support of 15 *amici curiae* and sought to place these Societies on the same level of responsibility as ASME's "certification of safety," although none of them offer proof of insurability and financial responsibility under their "standards."

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[2]see page 13.

DEFINITION OF "RESPONSIBILITY"

In the case of an engineering failure, the question that ultimately must be answered is "*who* was responsible"? This is strictly a personalized question on which Vice Admiral Hyman G. Rickover, USN, has given the engineering profession a clear definition:

> "Responsibility is a unique concept: it can only reside and inhere in a single individual. ... Unless you can point your finger at the man who was responsible when something goes wrong, then you have never had any one really responsible.
>
> "Service ceases to be professional if it has in any way been dictated by the client or employer. Professional independence is not a special privilege but rather an inner necessity for the true professional man, and a safeguard for his employers and the general public. Without it, he negates everything that makes him a professional person and he becomes at best a routine technician or hired hand, at worst a hack."

This concept of an engineer's responsibility, together with the confidence of the public in the engineering profession, comprises a rich heritage which stands as the primary bulwark for the protection of the public in the application of science and technology.

Regrettably, however, this concept of responsibility is not being perpetuated in the new postwar technologies, and the engineering profession is allowing itself to be subordinated to governmental authority. During the past decades we have seen many proposals for impressive scientific and engineering projects, but they are being promoted under political domination, completely devoid of financial respon-

sibility, and under deliberate censorship of any opposition. The net result is a breakdown in the areas of professional responsibilities, ethical standards, the Rule of Law, public safety, financial controls, and the accounting for public funds. The position of "Chief Engineer" has largely disappeared from the public domain and from engineering journalism.

This tragic situation reaches back more than three decades, according to a book published by ASME in 1947 under the title *Scientific Blacksmith*. Its author, Mortimer E. Cooley, former Dean of Engineering at the University of Michigan, wrote:

> "The engineers of the nation have failed to take advantage of the opportunity to play a more active part in our national government. This has seemed to me a real tragedy. ... As the matter now stands, the engineer creates the problems of his accomplishments, yet leaves the solutions to the economist, the businessman, the politician, and the statesman, who understand none of the technical phases of the problems. ... The engineer has played a passive part. ... He has been content in his field; in fact, he has gone to sleep on the job. He has been asleep nearly as long as was Rip Van Winkle."[2]

This is in stark contrast with the concept of "engineering responsibility" demonstrated on March 12, 1924 when the St. Francis Dam in California broke, resulting in the loss of 450 lives. The Chief Engineer who was responsible for the design and construction of

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[2]"Slow Death of a Free Profession," Adolph J. Ackerman, IEEE TRANSACTIONS-AES, Vol. AES-7, No. 3, May 1971; and "Using Engineering to Enslave You," Adolph J. Ackerman, CIVIL ENGINEERING-ASCE, Vol. 34, No. 7, July 1964.

this dam, William Mulholland, after 40 years of leadership in his profession, declared:

> "Don't blame anybody else. Whatever fault there was on this job, put it on me. If there were any errors in judgment — and it's human to make mistakes — the error was mine. I envy only those who are dead."

THE ASME CODE OF ETHICS

Ethics has been defined as the Science of Morality. The Society's fundamental principles of professional engineering ethics are defined in these words:

> The Engineer, to uphold and advance the honor and dignity of the engineering profession and in keeping with high standards of ethical conduct:
>
> I. Will be honest and impartial, and will serve with devotion his employer, his clients, and the public;
>
> II. Will strive to increase the competence and prestige of the engineering profession;
>
> III. Will use his knowledge and skill for the advancement of human welfare.

For an engineer wishing to enjoy the prestige of membership in ASME, and to take part in the responsibilities and objectives of the Society, he must commit himself unreservedly to upholding its Code of Ethics. This commitment assumes even greater importance when a member is elected to serve as one of the Society's officers. At that level these distinguished engineers, in addition to directing the many functions of the Society, have the additional duty of serving as a judiciary in upholding the Society's moral and

professional standards in the application of science and technology. They also have the painful duty of passing judgment on a member charged with violating the Code of Ethics.

From this perspective the Society's Board of Governors is placed on the same level of responsibility for our nation's well-being and security as is placed on the Justices of the Supreme Court, and the President of the Society holds the same status as the Chief Justice in defending the Constitution of the United States. In this context the President of the Society, with the approval of the Board ofGovernors, could approach the Court on his own responsibility and assist the court in reaching a wise judgment, instead of looking to the Society's attorney to find some limited legal premise for dismissing the pending penalty.

The importance — even the indispensability — to society of those who will identify their ethical obligations in a time of confusion, and act on them, was reviewed by the late Chief Justice, Earl Warren, in these notable words:

> "Society would come to grief without Ethics, which is unenforceable in the Courts, and cannot be made part of Law. ... Not only does Law in civilized society presuppose ethical commitment; it presupposes the existence of a broad area of human conduct controlled only be ethical norms and not subject to Law at all. ...
>
> "The individual citizen may engage in practices which, on the advice of counsel, he believes strictly within the letter of the Law, but which he also knows from his own conscience are outside the bounds of propriety and the right. Thus, when he engages in such practices, he does so not at his own peril — as

when he violates a Law — but at peril to the structure of civilization, involving greater stakes than any possible peril to himself.

"This Law beyond the Law, as distinct from Law, is the creation of civilization and is indispensable to it. ...

"A person able to discern the right in the midst of great confusion and to pursue it, is a person of character. A person may be learned or ignorant; he may be old or young, rich or poor, well or sick; whatever his condition he has to act, and his actions have their effect on himself and generally also on his fellow men.

"The education of both ministers of religion and of lay specialists, qualified to help the confused find himself in the maze of ethical problems is, in my opinion, one of the urgent needs of Western democracy, as it attempts to preserve its tradition of freedom in competition with rival systems of life."[3]

DECISION OF THE COURT OF APPEALS

In this brief the historical background has been presented to identify the magnitude of the responsibilities which have grown up in ASME at all levels, from the individual members, from the committees, to the administrators of the ASME Boiler Code and to the Board of Governors of the Society.

The Court of Appeals has sensed the importance of these responsibilities and has indicated that its decision was based on "a theory of negligence." The panel stated:

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[3]Address to the Louis Marshall Award Dinner of the Jewish Theological Seminary of America, New York, N.Y., Nov. 12, 1962.

> "While ASME may have no alternative to staffing its committees with business people having practical knowledge, there is a corresponding duty to be aware of and guard against the temptations thus afforded by inherent conflicts of interest. Absent from internal review procedures, no individual should be empowered to rule dispositively on the fitness of a competitor's product. When an organization has placed a person in a position to do what Hardin did, without any check or supervision, it must bear the consequences."

In the total documentation presented to the Supreme Court by the petitioner and by the fifteen supporting *amici curiae*, this relatively obscure citation merits special attention. It is claimed that

> "the Court of Appeals' holding imposes vicarious liability based on a theory of apparent authority ... and imposes an awesome penalty in the absence of the organization having ratified, acquiesced in, or even having known of the illegal activity."

In addition, it may be argued that the Hydrolevel enterprise was a relatively small one and that any penalty, if shown to be proper, should be correspondingly small. But the fact remains that the Hydrolevel product was an important link in a chain tied to great responsibilities to protect the public against the peril of explosion of a huge steam boiler under high temperatures and pressures. In the context of such awesome responsibilities, as they may involve many human lives, it could be argued that the penalty imposed by the District Court is not too large.

The criticism has been introduced:

> "Despite the plethora of contrary authority, the Second Circuit Court of Appeals

> employed a novel approach to agency concepts which has exposed ASME to antitrust treble damages. ... The court's rationale for its new standard was that it would 'induce greater care to prevent misconduct by agents occupying especially sensitive or responsible positions that invite reliance.' ..."

However, this rationale reflects a rare perception on the part of the Circuit Court regarding the greater surveillance and attention to detail demanded in the new and terribly dangerous technologies. Here the Rule of Law is still in its infancy and the public must place its reliance on the ethical disciplines and professional obligations of competent engineers. In these terms the Second Circuit Court has offered a warning of exceptional importance. In fact, the Court is deserving of a special tribute for its perception and recognition of the possibilities and dangers from obscure types of malpractice or exploitation of the industrial community and of the public's confidence.

It can be shown that the relatively "small" misconduct committed against Hydrolevel was preceded by a more serious violation and with the tacit acceptance at ASME's administrative level. This acceptance must be inferred from the absence of repudiation and from the absence of disciplinary actions against a clear violation of the ASME Boiler Code.

OUR NATION'S GREATEST PERIL

Today, our freedom to apply our professional services and ethical commitments for public safety is being progressively undermined by political, governmental, and subversive usurpation. Our nation can be brought to its knees by the simple process of destroying the disciplines which Jeremiah Allen and

Edward Meier bequeathed to the electric power industry. In the current technological revolution the leaders in our engineering profession, and our public leaders, are confronted with an obscure peril founded on the suppression of personalized professional responsibility and the suppression of our ethical obligations to future generations.

The engineering and industrial capabilities that have created the great miracle of America's electric power supply are taken for granted to such an extent that that American public is hardly aware of these great resources.

However, the night-time air traveler is bound to experience a new wonderment and awe as he looks down upon the continuous patterns of lights which identify the great cities, the towns, the villages, the farmhouses and the inhabitants along all the rivers. These beautiful illuminations offer a dramatic picture of a great nation and its industrious people. They also reflect the faith of the American people in their electric light and power supply, and in the dedicated public service of the personnel working day and night to produce the electricity.

And beyond all this stand the thousands of unseen engineers who have contributed their skills to the design, construction, and operation of safe steam-electric generating plants. The engineers have committed themselves to carrying out their responsibilities with first consideration for the *public's safety.* It is a professional service of which the American people are largely unaware — or, perhaps, their silence is a demonstration of their faith and confidence in the engineering profession.

It is a great public trust! It is a trust in the power of dedicated service to our nation under our God-given blessings of American liberty and free enterprise.

CONCLUSION

The ASME Boiler Code and the Code of Ethics for the conduct of its members are founded on the fundamental principle of personalized professional responsibility.

The present case is concerned with highly specialized responsibilities which have been built up and refined during a period of 70 years at a constant rate of progress and success. These responsibilities are the product of intellectual honesty in engineering and of the severe disciplines imposed by a private insurance company. In the present case ASME is saying that the society should not have accountability for its work. It is difficult to visualize the chaotic consequences to the entire engineering profession if the societies and their committees were to be relieved of their internal disciplines and responsibilities. The petition should, therefore, be denied.

ADOLPH J. ACKERMAN
Consulting Engineer
1250 Sherman Avenue
Madison, Wisconsin 53703

Of Counsel:
Henry A. Field, Jr.
1 South Pinckney Street
Madison, Wisconsin 53703

October 1981

APPENDIX

APPENDIX A

THE INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS, INC.

VOLUME 4 ☐ NUMBER 6 IEEE **spectrum** JUNE 1967

Editorial Board

C. Chapin Cutler *Editor*

Spectral lines: Duty to dissent

As an engineer, you have a responsibility to decide what is safe and for the public good. You must tell what you know through whatever avenues you can find

Duty to dissent. Of the many letters that come to this office, none have been more thought provoking than a letter appearing in this issue (see IEEE forum)*, in which Adolph J. Ackerman reproves professional journals for avoiding controversial issues, for giving the "silent treatment" to the voice of dissent.

Is it true, as he states, that editorial space for presentation of an unpopular viewpoint is virtually impossible to obtain in a reputable technical journal? Alas, it is true—although not because editors are necessarily contrary or stupid, or even timid. Our very methods of refereeing (i.e., having submitted papers judged by peers) militate against publication of articles about which there is substantial disagreement, as does the natural inclination of editors to publish that which they believe subscribers want to read. Dissenting opinions are likely to be unpopular. The strong desire of technical and scientific people to advance their profession and avoid political controversy is another deterrent. But perhaps the greatest hindrance to such publication is provided by the wish to present what is true, logical, and authoritative—and the voice of dissent seldom fulfills this requirement.

The editorial staff of any journal faces a difficult task in selecting papers. It is inevitable that some good papers will be rejected; that some bad ones will be published. However, recognizing the natural prejudice against unpopular causes, and their possible importance, editors should try very hard to give "equal time" to the dissenting voice. The challenge to recognize virtue in a dissenting viewpoint, to differentiate between prophet and crank, is a formidable one. The voice of dissent should be heard, however, and not only through correspondence columns.

A more serious, and even more basic, fault is the reluctance of most individuals to express their convictions publicly, and thus do their part as the conscience for our profession. The main reason that we don't hear much of the unpopular viewpoint is that dissent is seldom avail-

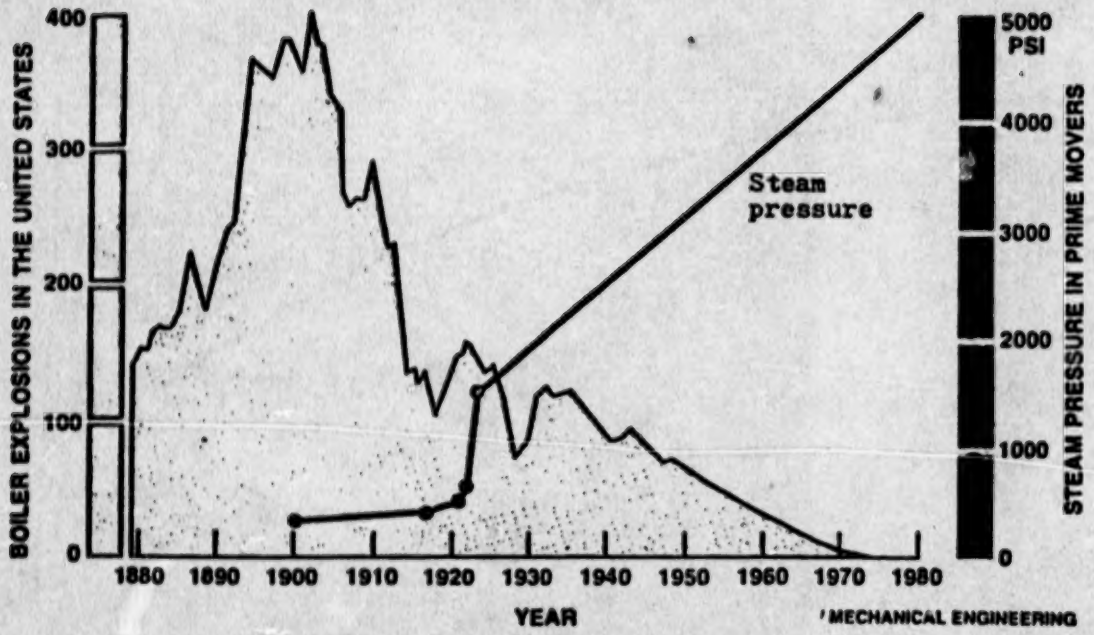
able in publishable form. Few will make the effort that Mr. Ackerman has made, to warn, publicly, of what is believed to be dangerous practice. It is not enough to grumble to our colleagues, or to write anonymous letters, as many do. What is required is clear, logical exposition, loaded with *facts* and backed by character. What we need most is the individual motivation to take the personal responsibility, as does Mr. Ackerman, to "record a dissenting opinion where the public interest is at stake."

It was not engineers who mounted the assault on pollution, but surely it was engineers who first knew what was happening to our water and to our air. It was not engineers who forced the program of safety in automobile design; but who was more aware of the problem? Who better than the engineers involved knew of the dangers in the Apollo spacecraft design and could have issued more effective warnings? Who can better police extravagant proposals for government contracts than the engineers,[1] and indeed, who can better tell us of the deficiencies and dangers in atomic power plants than the engineers who design them?[2]

Engineers have a responsibility that goes far beyond the building of machines and systems. We cannot leave it to the technical illiterates, or even to literate and overloaded technical administrators, to decide what is safe and for the public good. We must tell what we know, first through normal administrative channels, but when these fail, through whatever avenues we can find.

Many claim that it is disloyal to protest. Sometimes the penalty—disapproval, loss of status, even vilification—can be severe. The penalty for neglect of this duty, however, can be much more severe. Ackerman, in a published article,[3] quotes from Herbert Hoover[4]: "Our greatest danger is not from invasion by foreign armies. Our dangers are that we may commit suicide from within by complaisance with evil. Or by Public tolerance of scandalous behavior. Or by cynical acceptance of dishonor. These evils have defeated nations many times in human history. The redemption of mankind by America will depend upon our ability to cope with these evils here at home." Ackerman concludes: "Today we need more critical pronouncements and published declarations by engineers in high professional responsibilities. In some instances such criticism must be severe if we are properly to serve mankind and preserve our freedom. Hence it is of utmost importance that we maintain our freedom of communication in the engineering profession and to the public. The decades ahead are bound to be a critical and difficult period, and there will be occasions for sharp dissent and strong words if we are to meet our responsibilities."

C. C. Cutler

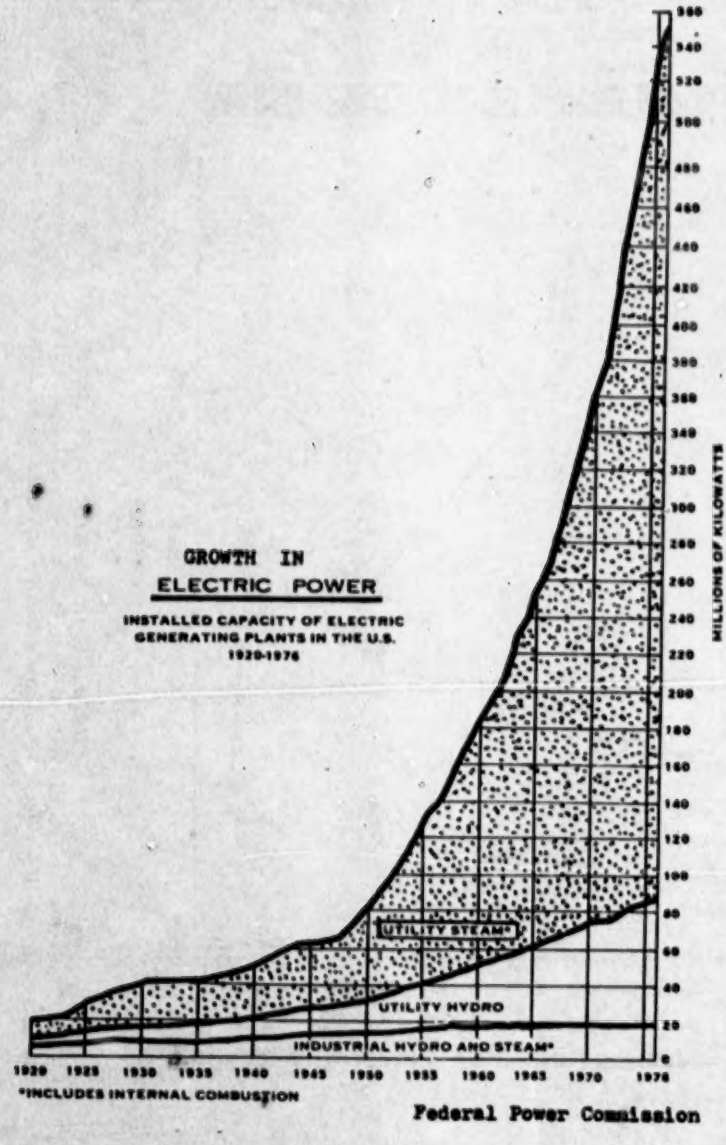


'MECHANICAL ENGINEERING
'JANUARY 1979.

DECLINE IN BOILER EXPLOSIONS

Fig. 1 There has been a dramatic decline in boiler explosions — even though steam pressures have steadily increased — because of the effective application of ASME codes and standards.

APPENDIX C


GROWTH IN
ELECTRIC POWER
INSTALLED CAPACITY OF ELECTRIC GENERATING PLANTS IN THE U.S. 1920-1976
MILLIONS OF KILOWATTS
UTILITY STEAM*
UTILITY HYDRO
INDUSTRIAL HYDRO AND STEAM*
1920 1925 1930 1935 1940 1945 1950 1955 1960 1965 1970 1976
*INCLUDES INTERNAL COMBUSTION
Federal Power Commission

Supreme Court, U.S.
FILED
AUG 3 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term 1980

No. 80-1765

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,

Petitioner,

v.

HYDROLEVEL CORPORATION,

Respondent.

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION OF ENGINEERING SOCIETIES IN SUPPORT OF THE PETITIONER, THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS

MICHAEL D. BROWN
Attorney for The American Association of Engineering Societies, Inc.
1370 Avenue of the Americas
New York, New York 10019
(212) 489-0220

Of Counsel:
HOWARD B. PRESANT
STEIN SIMPSON ROSEN & OHRENSTEIN
1370 Avenue of the Americas
New York, New York 10019

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Preliminary Statement

The American Association of Engineering Societies, Inc. ("AAES") is a non-profit membership corporation organized solely for scientific, educational and charitable activities in the public interest. As an association enjoying tax exempt status under §501(c)(3) of the Internal Revenue Code, the sole function of AAES is to serve the public by helping to develop an understanding of the technological considerations which have increasingly become part of various public policy decisions. By galvanizing the diverse expertise of its more than 38 member societies representing approximately 850,000 engineers, AAES has come to play an increasingly active role in discharging the responsibilities of engineers to advise the public and elected officials on technology and related issues of the day.

For more than forty (40) years, AAES*, its predecessor organizations, and its constituant societies have fulfilled their public interest work at no cost to the public through the "exploitation" of the talents of thousands of dedicated volunteers. Now, due to the decision of the United States Court of Appeals for the Second Circuit in *Hydrolevel Corporation* v. *The American Society of Mechanical Engineers,*** the ability of AAES, its member societies and other non-profit membership corporations to offer these increasingly important services to the public has been called into question.

While Petitioner, the American Society of Mechanical Engineers ("ASME"), has a direct pecuniary interest in the outcome of the *Hydrolevel* case, AAES and the other non-profit societies that make up its membership have a transcending interest in this Court's review of the decision below—the ability of non-profit membership corporations to continue to utilize the services of volunteers to perform their public interest work.

Statement of the Case

The narrow question presented by the instant case is whether, or to what extent, ASME may be held liable for treble damages under the antitrust laws for the improper and wholly unauthorized acts of two volunteers who, totally unbeknownst to ASME but using ASME procedures, sought to benefit their own commercial employers at the expense of a competitor. In deciding that a non-profit membership

*In December, 1979, the Engineer's Joint Council ("EJC") changed its name to AAES. EJC had previously been serving the public for more than forty (40) years and enjoyed tax exempt status since 1961.

**Dkt. Nos. 79-7254 and 79-7260, decided November 24, 1980.

corporation may be held liable for treble damages for the acts of disloyal volunteers who acted without authority and against their principal's interests, the lower court has, in our judgment, promulgated a sweeping rule of law that is not only at odds with prior decisions of this Court and other courts of appeal, but is entirely inconsistent with the long established public policy of encouraging the efforts of non-profit associations serving the public interest through the work of volunteers. Accordingly, this *amicus curiae* brief is submitted solely to address this important issue of public policy.

The Facts and Questions Presented

The facts of this case and the questions presented have been presented at length in ASME's Brief and are adopted for the purposes of this brief.

Summary of Argument

Simply stated, the decision below, if left to stand, will have a profound chilling effect on many, if not all, non-profit membership corporations which, of necessity, rely in good faith upon the work of their many volunteers. By ruling that a non-profit membership corporation may, under certain unspecified circumstances, be held vicariously liable for the unauthorized acts of its volunteer-agents, even where the acts at issue are taken without prior knowledge or approval and where they are not taken to advance the interests of the membership corporation, the Court of Appeals has ignored precedent, run afoul of long established public policy and created a "sword of Damocles" (the spector of treble damage liability) which is so threat-

ening that many such public service organizations may simply not be able to afford the risk of continuing to utilize the services of volunteers and will, therefore, have to discontinue rendering invaluable services to the public.

POINT ONE

The Decision Below creates a Rule of Law that is against long established public policy and will have a disastrous effect on Non-Profit, Voluntary Membership Organizations.

While holding that a non-profit membership corporation may be held liable under the antitrust laws for acts of volunteers which are neither authorized, intended to benefit the organization or even consistent with the corporation's purposes, the Court of Appeals has, in effect, made these public interest corporations "insurers" of the good faith of their volunteers. Since these non-profit organizations must rely primarily on the work of volunteers, this ruling, which is not only inconsistent with prior decisions of this Court and of other courts of appeal, if left to stand, will do nothing less than require non-profit corporations such as AES and the nearly 850,000* engineers represented

*The 850,000 engineers are represented by some 38 member societies drawn from the broad spectrum of the various engineering disciplines. These societies include: The American Society of Civil Engineers; The American Institute of Mining, Metallurgical & Petroleum Engineers, Inc.; The American Society of Mechanical Engineers; The Institute of Electrical & Electronic Engineers; The American Society for Engineering Education; The American Society of Heating, Refrigerating & Air-Conditioning Engineers, Inc.; The American Society of Agricultural Engineers; The American Institute of Chemical Engineers; The American Society for Metals; The National Council of Engineering Examiners; The Society of Manufacturing Engineers; The National Society of Professional Engineers; The National Institute of Ceramic Engineers; The Society of Allied Weight Engineers, Inc.; The

by its member societies to cut back on the broad spectrum of services they have traditionally provided to our society. Clearly, this decision extending the doctrine of vicarious liability holds for our society potentially serious adverse consequences and should not be left to stand.

As stated, the decision by the Second Circuit has broken new ground in expanding the concept of vicarious liability under the antitrust laws. However, by imposing liability on corporate principals for the acts done by an agent under his "apparent authority" the lower court has disregarded the basic principle long ago enunciated by this Court that participation in a conspiracy requires, at the least, a "unity of purpose or a common design and understanding, or a meeting of minds in an unlawful agreement." *American Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946). While corporations have long been held "responsible for the wrongs committed by its agents in the course of its business", this Court has required that before a corporation may be held liable for the acts of its agents". . . it must be shown that (the act complained of) is in the business of the corporation." *United Mine Workers of America* v. *Coronado Coal Co.* 259 U.S. 344, 395 (1922).

Society of Plastics Engineers, Inc.; The American Society for Quality Control; The Standards Engineering Society; The American Institute of Industrial Engineers, Inc.; The Society of Women Engineers; The Society of Fire Protection Engineers; The American Institute of Plant Engineers; The American Nuclear Society; The American Academy of Environmental Engineers; The American Association of Cost Engineers; The System Safety Society; The Association of Energy Engineers; The American Indian Science & Engineering Society; The Air Pollution Control Association; The American Congress on Surveying & Mapping; The National Association of Corrosion Engineers; The Federation of Materials Societies; The Western Society of Engineers; The Cleveland Engineering Society; The Engineering Society of Detroit; The Washington Society of Engineers; The Colorado Society of Engineers; The Colorado Engineering Council; and The Engineering Societies of New England, Inc.

Indeed in applying the ruling of *Coronado Coal* and explaining the rationale for holding a corporation criminally liable for the acts of its agents, the Ninth Circuit Court of Appeals has noted that antitrust violations are usually motivated by a desire to enhance profits; commonly involve large, complex, and highly decentralized corporate business enterprises; and more often than not, involve the implementation, over an extended period of time, of basic policy decisions. *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1006 (9th Cir. 1972), *cert. den.* 409 U.S. 1125 (1973).

By extending the rule of vicarious liability to cover acts done by agents under "apparent authority", the Court of Appeals has not only run afoul of the decision by this Court in *Coronado Coal supra*, but has imposed treble damage antitrust liability on a corporation whose policies are not only *not* profit oriented but whose very existence as a tax exempt "501(c)(3)" membership corporation rests upon its performance of scientific, educational and charitable services *in the public interest*. In sharp contrast to the decision in *Hilton Hotels, supra*, where the Ninth Circuit recognized that vicarious liability of a corporation was justified by the fact that antitrust violations are usually the result of the implementation of basic policy decisions, the acts here involved were not the result of basic policy decisions, but were, in fact, the result of a total and unauthorized perversion of the basic policies of the corporate principal.*

---

*Indeed in holding the Hilton Hotel Corporation liable for the act of its agent, the Ninth Circut specifically noted that:

> "A purpose to benefit the corporation is necessary to bring the agent's acts within the scope of his employment." *Standard Oil Co.* v. *United States*, 307 F.2d 120, 128-129 (5th Cir. 1962)

In the instant case, it is conceded that the conspirators had no intention of benefitting ASME.

The case for restricting the imposition of corporate liability for those acts of agents which are either expressly authorized or at least taken to advance the purposes of the corporate principal is clear with regard to the instant matter. ASME, AAES and other non-profit membership corporations must by reason of their charters and tax exempt status limit their activities to scientific, educational and charitable functions. While the very nature of these restrictions compels these organizations to rely on the work of volunteers, it has also allowed them to perform important public services at no cost to the public. For example, the very code which is at the heart of the instant case has been established through the efforts of volunteers and has been responsible for the virtual elimination of heating boiler explosions.

Other services provided to society by non-profit membership corporations are simply too many to enumerate. Not only does AAES utilize the services of more than 600 individual volunteers to staff its more than forty (40) committees, but the constituent societies of AAES employ the services of thousands of volunteers, all expressly limited by the charters of member organizations to educational, scientific or charitable activities. While many pages could be devoted detailing the work of each of AAES' 38 member societies and their volunteers, a brief description of the activities of only a few such societies readily demonstrates not only the services they provide, but the enormous problem created for them by the decision below. For example, the American Institute of Mining, Metallurgical and Petroleum Engineers, Inc. ("AIME") not only produces five monthly, one bi-monthly and one annual publication, but also utilizes volunteers to identify and disseminate information concerning significant developments in the area of mining, metallurgical and petroleum technology. Similarly, the American Society for Metals ("ASM") also works

through volunteers and actively disseminates information concerning advances in the engineering, design, processing and fabricating of metals and like materials to the general public as well as the profession. Finally, the American Society of Civil Engineers ("ASCE") was, prior to the decision of the Circuit Court, planning to embark on a codes and standards program dealing with the various components of civil engineering. Obviously, the spector of treble damage antitrust liability may deter not only the full implementation of the ASCE standards and codes program, but may also cause the other societies to cut back on their activities since it is virtually impossible for the permanent staffs of the societies to, in effect, guarantee that none of their volunteers are not reporting what appears to be an advance in the state of the art, but which is really nothing more than a well-camouflaged endorsement for a procedure or process utilized by a particular private concern.

In addition to the activities of AAES and its member societies, contributions of non-profit membership corporations also include the efforts of bar associations, medical associations, accountants organizations and community planning boards, to name just a few which have historically mobilized billions of dollars of manpower and talent for the benefit of the general public. These many associations have played important roles in improving public safety and product reliability, maintaining high ethical and professional standards for the various professions and providing for the dissemination of information necessary to the increasing quality of our lives.

If AAES, its member societies and other non-profit membership corporations are forced to choose between exposing themselves to the devastating consequences of treble damage antitrust liability or cutting back on the

utilization of volunteers, with the concommitant dimunition of services rendered to the public, the choice is clear—services will have to be cut back. The consequences to American society of such a decision are profound indeed. We have historically opted to have voluntary non-profit professional associations monitor the standards of admission to the practice of many of our professions. Do we now wish to turn back those responsibilities to government? In an age of increasing reliance on engineering and technology, do we wish to have the government undertake the herculean and costly responsibility for promulgating and interpreting codes and standards? Clearly, society has in the past been well served by allowing the private sector to discharge these responsibilities—all through the acts of volunteers.

This is not to say that non-profit organizations should be immune from suit. Quite the contrary. Each of these organizations do have responsibilities to monitor reasonably the activities of their volunteers. Nevertheless, it is simply unrealistic to expect these organizations to detect every possible disloyal volunteer before he acts. What is necessary is a balancing of priorities. Indeed, this Court has previously articulated a perfectly workable rule which recognizes the need to foster volunteerism on the one hand while holding such organizations properly accountable for acts of their volunteers taken to advance the interests of the organization. Thus, in the second *Coronado Coal* case, this Court refused to hold a union liable for acts encouraged by its president and held that:

> "In our previous opinion we held that a trade-union, organized as effectively as this United Mine Workers' organization was, might be held liable, and all its funds raised for the purpose of strikes might be levied upon to pay damages suffered through illegal methods in carrying them off; *but certainly,*

> *it must be clearly shown in order to impose such a liability on an association of 450,000 men that what was done was done by their agents in accordance with their fundamental agreement of association.*" *Coronado Coal* v. *United Mine Workers of America*, 268 U.S. 295, 304 (1925) (emphasis added).

This principle applied to a labor union, that a large organization may only be held responsible for acts taken to benefit the organization should be applied to non-profit membership corporations. As in the case of labor unions, non-profit membership corporations serve important public functions which must be recognized by our courts. By applying the test of "apparent authority" to the instant case, the lower court has, in our view, unwisely failed to recognize the need to balance these competing interests.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court should be reversed.

Respectfully submitted,

MICHAEL D. BROWN
1370 Avenue of the Americas
New York, New York 10019
(212) 489-0220

Attorney for The American Association of Engineering Societies, Inc.

Of Counsel:
HOWARD B. PRESANT
1370 Avenue of the Americas
New York, New York 10019
Dated: July 30, 1981

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No. 80-1765

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,

Petitioner

v.

HYDROLEVEL CORPORATION,

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN SOCIETY FOR TESTING AND MATERIALS IN SUPPORT OF PETITIONER

Lewis H. Van Dusen, Jr.
Morris R. Brooke
Robert J. Hoelscher
DRINKER BIDDLE & REATH
1100 PNB Building
Broad and Chestnut Streets
Philadelphia, PA 19107
(215) 988-2700
Attorneys for the American Society for Testing and Materials
Philadelphia, Pennsylvania

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CONSENT TO THE FILING OF THIS BRIEF

Counsel for petitioner and counsel for respondent have each consented to the filing of this brief *amicus curiae* by the American Society for Testing and Materials ("ASTM" or "the Society"). Copies of their letters are filed with this brief.

INTEREST OF THE AMICUS CURIAE

ASTM is a nonprofit scientific and educational Society. It was incorporated in 1902 for the stated purpose of "the development of standards on characteristics and performance of materials, products, systems and services, and the promotion of related knowledge."

ASTM is the major developer and publisher of standards in the United States. Its activities are limited to the development of standards (and methods of test to determine compliance

with standards) and the promotion of related knowledge. It does not certify products; it does not test products; it does not involve itself in any way in the marketing of any product, material, system or service for which a standard has been developed under its auspices.* Its standards are widely used solely because of the universal respect for the technical and scientific validity of its work.

ASTM's standards and test methods deal with a wide range of materials and subjects. A partial list includes ferrous and nonferrous metals; ceramic, concrete, and masonry materials; wood, plastics, adhesives, solvents, and

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* ASTM is exempt form federal income taxation under Section 501 (c) (3) of the Internal Revenue Code, and exempt form state and local taxation under Pennsylvania law. Application of ASTM, 231 F.Supp. 686 (E.D.Pa. 1964); ASTM v. Board of Revision of Taxes, 423 Pa. 530, 225 A.2d 557 (1967).

petroleum products; microscopy, metallography, statistical methods and measurements of various kinds. Today there are 139 main technical committees in ASTM engaged in work in these and many other areas.

The standards development work of the Society is carried on by approximately 84,000 participants who, voluntarily and without compensation, serve on the main committees and thousands of sub-committees, task groups and other units within the Society. These persons are representatives of industrial companies, government agencies, academic institutions, libraries, consulting firms, etc., as well as individual scientists, doctors, architects, engineers and others interested in the Society's work. Approximately 10% of them come from outside the United States.

The Society has provided the framework within which these volunteers do their important work. The Society provides only administrative assistance and procedural rules and regulations designed to insure that due process is afforded all participants in its work and that a true consensus of their views is achieved.

The opinion and judgment of the United States Court of Appeals for the Second Circuit in this action may impose upon ASTM liability under the anti-trust laws for the acts of any of the many thousands of participants in its work, even though those acts are not authorized or endorsed by the Society and are, in fact, beyond the Society's power to prevent or control. The Society has an interest in seeking to prevent this unfortunate (and, we

believe, unwarranted) new development in the law.

QUESTION PRESENTED

May a non-profit, membership organization be held liable under the anti-trust laws for acts of participants in its work which purport to be taken on behalf of the organization, but which are not authorized or endorsed by the organization and are beyond the organization's power to control?

SUMMARY OF ARGUMENT

It is unreasonable, and contrary to the public interest, to impose liability under the anti-trust laws upon a voluntary membership organization for acts of participants in its work which the organization has not authorized or endorsed and which it cannot control.

ARGUMENT

As we have pointed out above, there are some 84,000 participants in the work of ASTM's thousands of technical committees, sub-committees, task groups and other units. The standards and methods of test published by the Society are the product of the work of these persons.

Each of these units has a chairman and other officers. Virtually all participants are (and must be to do their work) equipped with ASTM stationery and other paraphernalia which could be misused without the Society's knowledge.

ASTM has a headquarters in Philadelphia and a staff of approximately 200 persons whose function it is to provide the administrative services and support to enable the committees, sub-committees and other units of the

Society to do their work. There is absolutely no way that headquarters personnel can control each and every written communication (much less every oral communication) emanating from the chairmen, officers or members of the Society's committees, sub-committees and other units. There is no way that the Society can prevent one or more of these individuals from issuing some interpretation of one of the Society's standards or methods of test which he purports to be issuing on the Society's behalf but which is, in fact, unauthorized.

If the Society may be held liable under the anti-trust laws for such a communication, the Society (a non-profit corporation with modest assets) is likely to continue to exist only until the entry of the first substantial anti-trust judgment against it under this new rule of law.

We believe that such a rule of law is unfair, unreasonable and not in the public interest.

ASTM (and other organizations like it) perform an important public function. Rather than attempting to describe the importance of ASTM's work ourselves, we quote below what courts have said on this subject:

"ASTM is the first source to which federal, state and municipal governments turn in seeking specifications, and ASTM specifications (standards) are more widely used by them than the specifications of any other body. These governments rely extensively upon ASTM since they have neither the time nor the money to write all their own specifications, and their dependence upon ASTM is increasing all the time.

"The writing of specifications by ASTM is an activity in the public interest and conducive to the public welfare, and is important to the future operation of industry and government.

"Membership in ASTM, participation on its committees, the expression by members of their scientific opinions in committee meetings, and voting by members on proposed specifications, are activities in the public interest and conducive to the public welfare."

(Application of the American Society for Testing and Materials, U.S.D.C., E.D.Pa., 231 F.Supp. 686 (1964) Findings of Fact, Nos. 20,21,23)

"Among the objective achievements of the Society's works may be enumerated: Safer buildings, better roads, improved surgical implants, more advanced missiles; New scientific discoveries and developments resulting from advanced research; Better education for science and engineering students; Free library, free lectures and free knowledge for all people; Critical and necessary work for federal, state, municipal and foreign governments; Savings to federal, municipal and other taxpayers.

(American Society for Testing and Materials v. Board of Revision of Taxes, 423 Pa. 530, 534, 225 A.2d 557, 559 (1967))

A rule of law which imposes liability upon ASTM for the acts of participants in its work, which the Society has not authorized and cannot control, would jeopardize the Society and its work for no reason. The person who does these unauthorized acts (and presumably the organization which this person represents) may be held

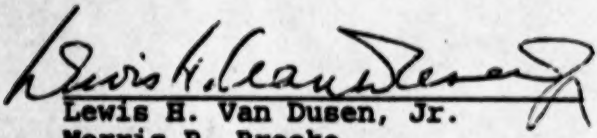
liable under the anti-trust laws for their conduct. There is no public interest to be served by formulating a rule of law which makes an unwitting non-profit corporation (which would disavow the acts if it knew of them) also liable. Such a rule, if allowed to stand, can lead to the destruction of voluntary organizations like ASTM and the termination of their important public work.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of

Appeals for the Second Circuit should be reversed.

Respectfully submitted,



Lewis H. Van Dusen, Jr.
Morris R. Brooke
Robert J. Hoelscher
DRINKER BIDDLE & REATH
1100 PNB Building
Broad & Chestnut Streets
Philadelphia, PA 19107
(215) 988-2700

Attorneys for The American Society for Testing and Materials
Philadelphia, Pennsylvania

AFFIDAVIT OF FILING AND SERVICE

COMMONWEALTH OF PENNSYLVANIA :
ss.
COUNTY OF PHILADELPHIA :

Lewis H. Van Dusen, Jr., being duly sworn according to law, deposes and says upon his personal knowledge:

1. I am a member of the Bar of the Supreme Court of the United States and an attorney for the American Society for Testing and Materials ("ASTM") in this case No. 80-1765.

2. On July 29, 1981, I caused to be sent by first class United States mail, postage prepaid, 40 copies of the foregoing Brief Amicus Curiae of ASTM, together with the ancillary papers required by the Rules of this Court, to the Clerk of this Court for filing.

3. On July 29, 1981, I caused to be served by first class United States

mail, postage prepaid, 3 copies of said Brief upon Harold R. Tyler, Jr., Esquire, 30 Rockefeller Plaza, New York, NY 10112, counsel for petitioner in No. 80-1765, and upon Carl W. Schwarz, Esquire, One Farragut Square South, Washington, DC 20006, counsel for respondent in No. 80-1765.

Lewis H. Van Dusen, Jr.

Sworn to and subscribed
before me this 29th day
of July, 1981

Notary Public

ROSE A. MULLIGAN
NOTARY PUBLIC
PHILA. COUNTY, PHILA.
My Commission Expires Jan. 19, 1983

Office - Supreme Court, U.S.
FILED
OCT 24 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1765

In the Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,
Petitioner

v.

HYDROLEVEL CORPORATION,
Respondent

On Writ of Certiorari To The United States Court of Appeals For The Second Circuit

BRIEF OF ECOS ELECTRONICS CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT HYDROLEVEL CORPORATION

MERLE L. ROYCE
CHAPMAN & ROYCE, LTD.
33 N. Dearborn Street
Chicago, IL 60602
(312) 263-0789

Of Counsel:

JAMES P. CHAPMAN
CHAPMAN & ROYCE, LTD.
33 N. Dearborn Street
Chicago, IL 60602
(312) 263-0789

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MOTION OF ECOS ELECTRONICS CORPORATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT HYDROLEVEL CORPORATION, INSTANTER

Now comes ECOS Electronics Corporation and asks this Court for leave to file a brief *amicus curiae* in support of respondent Hydrolevel Corporation, instanter. In support of this motion ECOS Electronics Corporation states as follows:

(1) ECOS Electronics Corporation has a substantial interest in the issues presented in the instant case, as is set out in full in the attached brief.

(2) Hydrolevel Corporation has consented to the filing of numerous briefs as *amicus curiae* in support of Petitioner. Petitioner has refused to consent to the filing of this or any other brief as *amicus curiae* in support of Respondent.

WHEREFORE, ECOS Electronics Corporation asks this Court for leave to file a brief *amicus curiae* in support of respondent Hydrolevel Corporation, instanter.

Respectfully submitted,

MERLE L. ROYCE
CHAPMAN & ROYCE, Ltd.
33 N. Dearborn Street
Chicago, IL 60602
(312) 263-0789

Of Counsel:
JAMES P. CHAPMAN
CHAPMAN & ROYCE, Ltd.
33 N. Dearborn Street
Chicago, IL 60602
(312) 263-0789

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In the

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BRIEF OF ECOS ELECTRONICS CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT HYDROLEVEL CORPORATION

INTEREST OF ECOS ELECTRONICS CORPORATION

ECOS Electronics Corporation ("ECOS") is a small manufacturer of electrical safety and measuring equipment. Like Hydrolevel, respondent in the instant case, ECOS has been the victim of anti-competitive activities of standards organizations.

ECOS is the plaintiff in a currently pending lawsuit in which it has alleged *inter alia* that its products have been wrongfully excluded from the marketplace by an irrational and arbitrary standard promulgated by the National Fire Protection Association ("NFPA") (*ECOS Electronics Corporation v. Daniel Woodhead, et al.*, Case No. 81 C 3939, currently pending in the United States District Court for the Northern District of Illinois before Judge John F. Grady.)

The briefs filed in this Court by petitioner, American Society of Mechanical Engineers ("ASME") and the National Fire Protection Association ("NFPA"), as *amicus curiae*, rely heavily on what is essentially a naked plea for the sympathy of the Court. They continuously refer to themselves as "voluntary," "nonprofit," and "dedicated to the public interest." Their plea to this Court is that the rule of liability enunciated by the Court of Appeals in the instant case, if allowed to stand, will destroy the ability of standards organizations to function.

ECOS respectfully submits that standards organizations are not delicate entities which cannot withstand the full force of the anti-trust laws. Rather, they are typically large, well-funded organizations whose "volunteers" are in fact executives of private companies who, as part of their jobs, work through various standards organizations to develop standards which will enhance their employers' market position.

The rule of liability enunciated by the Second Circuit in the instant case will not result in the destruction of standards organizations; rather, ECOS submits, this rule is the only rule by which standards organizations can be effectively brought within the ambit of the anti-trust laws.

SUMMARY OF THE ARGUMENT

The Second Circuit Court of Appeals in the instant case held that ASME is liable for damages to Hydrolevel caused by the promulgation of a misleading interpretation of a standard by two of ASME's members, and by its failure to properly supervise the activities of members who ASME knew had significant conflicts of interest.

Petitioner, ASME, supported by various *amicus curiae,* has challenged this ruling as unprecedented, unworkable and destructive of standards organizations' ability to function. The present brief is limited to a discussion of the latter two points, as the legal support for the Second Circuit's ruling is fully and persuasively set forth in Hydrolevel's brief before this Court, as well as in the Second Circuit's opinion itself.

ECOS respectfully submits that standards organizations are financially supported by private business concerns; their so-

called "voluntary members" are in fact typically highly paid executives in private business whose salary and expenses are paid by their employers while they are doing their "volunteer" work for standards organizations; and that private business is willing to make these large expenditures of money and personnel not because of their commitment to the public good, but because they understand that standards are a powerful force in shaping the market for their products and can therefore be used either to increase their own market penetration or to exclude competitors from the market.

All of the activities of standards organizations are carried out by these "volunteers." Unlike a typical corporation where the activities of shareholders cannot be properly imputed to the corporation, the activities of the members of a standards organization are identical to the activities of the standards organization.

Thus, in practical terms, the only way that standards organizations can be held accountable for their anti-trust violations is if they are held liable for the wrongful acts of their members where the organizations either approved of the wrongful conduct or, as in the instant case, knew that strong conflicts of interest were present, yet did nothing to prevent abuse of the standards making process. Affirmation of the Second Circuit's holding in this case is thus necessary if standards organizations are to be held accountable under the anti-trust laws.

ARGUMENT

Petitioner ASME in its brief before this Court requests that the ruling of the Second Circuit Court of Appeals in the instant case be reversed. ASME's argument, as well as the arguments of various standards organizations who have filed briefs *amicus curiae* in support of ASME's position, relies heavily on the allegedly "voluntary" or "non-profit" character of standards organizations.

ECOS respectfully submits that this characterization of standards organizations has no basis in fact. NFPA, which has submitted an *amicus curiae* brief in which it continually pleads with the Court to reverse the Second Circuit's ruling or risk destroying standards organizations, is among the larger standards or-

ganizations in the country. Its structure and methods of operation are typical of such organizations. The following argument, using NFPA's operations as they have affected ECOS as illustrations, demonstrates the artificiality of ASME's argument and the necessity for the rule of liability set out in the Second Circuit's opinion in the instant case.

I.
THE NATURE OF STANDARDS

Standards in the United States are developed under the auspices of hundreds of private, wholly unregulated standards organizations including NFPA and ASME. These standards specify in detail design and performance requirements for a virtually unlimited variety of consumer and industrial products.

Standards organizations themselves have no power to enforce compliance with the standards they promulgate. However, standards are routinely incorporated into legislation at all levels of government ranging from local building codes to Federal Occupational Safety and Health regulations. (Brief of ASME, page 3). Additionally, these privately developed standards are routinely incorporated into both government and private purchasing requirements. This use of their standards is actively encouraged by standards organizations.

Thus, if a particular product fails to comply with a specification included in one of these privately developed standards, it is barred from the market place as effectively as if its use had been legislatively prohibited. Likewise, if language in a standard appears to call for the use of a particular product, that product's market will expand as if its use had been legislatively mandated.

II.
THE NATURE OF STANDARDS ORGANIZATIONS

NFPA, among the largest of these standards organizations, has over 32,000 members. Its income for 1980 totaled over $15 million, and its expenses were slightly under $13 million.

NFPA has promulgated over 200 standards, including NFPA Standard 70-B: Electrical Equipment Maintenance ("NFPA

70-B"): the standard which has been used by ECOS' major competitor to substantially exclude ECOS from the market for its product.These standards are developed in committees by specially appointed technical committee members of NFPA. Members who are appointed to these technical committees comprise only a small portion of the total membership (less than 10 percent). Technical committee members typically are executives of large corporations which either market or use a product which is covered by the standard.

For example, there are two primary manufacturers of the particular equipment at issue in ECOS' anti-trust action: Daniel Woodhead Company, a large manufacturer of a wide variety of electrical devices, and ECOS, a smaller, more specialized manufacturer. The market for this equipment is vitally affected by the NFPA 70-B. In 1974, NFPA appointed Alan Reed, an executive officer of Daniel Woodhead Company, as chairman of the 70-B committee. Other members of the NFPA 70-B committee were employed by other large manufacturers of electrical equipment (e.g., Westinghouse Electric Corporation, Western Electric Company, and Pass and Seymour) or large users of electrical equipment (e.g., E.I. duPont de Nemours & Company, and Eastman Kodak Company). It is in the interest of these companies to resist technological advancement or change which could require them to modify or replace their existing equipment.

Each of these so-called "volunteer" technical committee members is paid by his employer for the time spent on his committee work. The employer also pays the expenses incurred by its employees while doing committee work.*

The potential conflict of interest which is inherent in this structure is obvious. Given the quasi-legislative nature of standards, the potential for stifling competition by manipulating standards is enormous. Yet, as the Second Circuit Court of Appeals so aptly pointed out in the instant case, ASME had virtu-

---

* Thus, one of the criteria for membership on NFPA's 70-B committee is a demonstrated financial backing which will enable one to attend committee meetings. This financial backing is routinely provided by the "volunteer's" employer.

ally no safeguards to insure that standards of their interpretations were not so manipulated.

In ECOS' case, Alan Reed was able to include language in NFPA 70-B which first, specifically excludes ECOS's product and second, virtually specifies the use of Daniel Woodhead Company's product. The full committee approved the standard, including this exclusionary language, and NFPA subsequently officially promulgated the standard as approved by the commitee.

In the anti-trust case brought by ECOS against NFPA and others, ECOS foresees that NFPA will adopt the same argument that ASME and NFPA, as *amicus curiae*, have taken before this Court. That is, whatever exclusionary activities may have been performed under its auspices, they were not officially sanctioned by NFPA and therefore NFPA should be held harmless for any damages which may have resulted from the wrongful conduct of individual members.

The metaphysical distinction between the actions of standards organizations and the actions of the members of standards organizations urged upon this Court by ASME and various *amicus curiae* has no basis in the practical everyday operations of standards organizations.

As ASME and NFPA readily concede in their briefs before this Court, the actual work of standards organizations—writing standards—is done entirely by their members (Brief of ASME, page 61, *Amicus Curiae* Brief of NFPA, page 3). In fact, standards organizations don't do anything other than through their individual members.

Recognizing this essential identity between standards organizations and their members, the Second Circuit held ASME liable for the wrongful acts of its members. ECOS respectfully urges that this Court must affirm the Second Circuit's holding if the enormous power wielded by standards organizations is to remain accountable under the anti-trust laws. Without this accountability, innovative companies like Hydrolevel Corporation and ECOS Electronics Corporation will continually be at the mercy of standards organizations which are dominated by their more established competitors. Free competition and technical

innovation will suffer, and the public will suffer from higher priced and lower quality products.

CONCLUSION

For all of the foregoing reasons, the decision of the Second Circuit should be affirmed.

Respectfully submitted,

MERLE L. ROYCE
CHAPMAN & ROYCE, Ltd.
33 N. Dearborn Street
Chicago, IL 60602
(312) 263-0789

Of Council
JAMES P. CHAPMAN
CHAPMAN & ROYCE, Ltd.
33 N. Dearborn Street
Chicago, IL 60602
(312) 263-0789

MOTION FILED
OCT 19 1980

NO. 80-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN SOCIETY OF MECHANICAL ENGINEERS,
Petitioner
v.
HYDROLEVEL CORPORATION,
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT, HYDROLEVEL CORPORATION

STEPHEN G. GLATZER
EMERGENCY BEACON CORPORATION
15 River Street
New Rochelle, New York 10801
(914) 235-9400
AMICUS CURIAE

HARVEY S. BARR, ESQ.
ATTORNEY FOR
EMERGENCY BEACON CORPORATION
664 South Main Street
Spring Valley, New York 10977
(914) 352-4080

LAW REPRINTS EDITOR'S NOTE: THE MOTION OF STEPHEN G. GLATZER, ET AL. FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE WAS DENIED BY THE COURT ON NOVEMBER 9, 1981, AND IS INCLUDED HERE IN THE INTEREST OF COMPLETENESS.

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NO. 80-1765

IN THE SUPREME COURT OF THE
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AMERICAN SOCIETY OF MECHANICAL ENGINEERS,
Petitioner,

v.

HYDROLEVEL CORPORATION
Respondent

On Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

MOTION OF STEPHEN G. GLATZER
AND
EMERGENCY BEACON CORPORATION
FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 36.3 of the rules of this Court Stephen G. Glatzer and Emergency Beacon Corporation respectfully move the Court for leave to file a brief Amicus Curiae in the above entitled case. This brief is submitted in support of the respondent, Hydrolevel Corporation. Counsel for petitioner American Society of Mechanical Engineers, Harold R. Tyler, Jr., denied

movant's request for consent.

INTEREST OF AMICUS CURIAE

1. Stephen G. Glatzer is president of Emergency Beacon Corporation, (hereinafter EBC). EBC has had and is having problems with a voluntary standards group, the Radio Technical Commission on Aeronautics, (hereinafter RTCA) which have similar problems to those of Hydrolevel with the American Society of Mechanical Engineers, Inc., (hereinafter ASME). Glatzer testified before the Federal Trade Commission and was cross examined by Mr. William Rockwell of ANSI (See Appendix P . A-11 and A-12) who has submitted an Amicus Curiae brief in the instant matter. In his testimony before the Federal Trade Commission, (hereinafter FTC), in its inquiry on "Proposed Trade Regulation Rule: Standards and Certification", Glatzer offered the unique viewpoint of a member of a

voluntary standards organization who is also the president of a small high-technology corporation that was in danger of having its major product classified as not meeting the standards promulgated by RTCA. The testimony of Glatzer before the FTC and the light that it cast upon the potential misuse of the apparent authority of RTCA as a result of the lack of due process and appeals mechanisms available, caused RTCA to take a more reasonable position. Recently, however, the new Congress made it clear to the FTC that it should not attempt to regulate the voluntary standards and certification organizations such as RTCA and ASME. Small high-technology companies, such as Emergency Beacon Corporation, must now look to a private antitrust action against the standards organizations as their only means of redress. Fortunately, the

Hydrolevel decision of the Second Circuit Court of Appeals, articulates the mechanism for judicial redress of abuses that take place in standards and code-setting organizations as the new Congress apparently intended. Should this Honorable Court affirm the Second Circuit panel the precedent established with regard to apparent authority and negligent liability, will in your movant's opinion, suffice to protect the interests of the many businesses and corporations who strive to introduce technologically superior and often economically more attractive products to the market. On the other hand, should this Court reverse and adopt the position espoused by ASME and the multiple amici curiae briefs of the standards organizations, thereby effectively granting them the immunity they pray for, the sole remaining check on the absolute power of the

private standards groups will be nullified to the eventual destruction of Emergency Beacon Corporation and countless other small companies in similar circumstances that form the innovative roots of the free enterprise system. This was certainly not the intent of Congress when they suggested substituting private antitrust actions for FTC regulations.

DESIRABILITY OF AN AMICUS CURIAE BRIEF

2. The instant brief is desirable because unlike the briefs of the petitioner and respondent and the other amici curiae that have been submitted on behalf of the respondent, your movant is an active member of and participant in a private voluntary standards group and fully appreciates the need for such groups, the difficulty of obtaining volunteers to serve thereon and the dynamics that exist in the group. Most importantly, your movant is also a small corporation

whose very existence has been threatened by abuses that occurred within said standards group, and, therefore, is in the unique position of seeing both sides of the issue. The annexed brief will show that the Second Circuit's decision will in fact not create a hardship for the voluntary private standards groups and would, on the other hand, encourage them to more closely fulfill the function for which they were designed. We would hope to show the Court that the private standards groups as they now exist are not pristine pure public-spirited bodies as has been claimed by ASME and the other standards groups, but have elements that are thinly veiled cartel-like arrangements which tend to exclude competitors from selling their products for particular uses in particular markets. We will further show that under

the Second Circuit standard of "negligent liability", the probability of a standards group being manipulated by certain of its members would decrease substantially without significant ill effects on the groups themselves. Indeed, one of the practical factors not discussed in the briefs that your movant has examined, is the universal maxim in the business world that nothing is free and the "free" services of the multitude of "volunteers" who populate these organizations are not truly free, but are donated with the expectation that the standards and codes that will be promulgated by said organizations will, at best, benefit the corporate sponsors of the "volunteers" or at the very least, prevent their corporate interests from being harmed.

CONCLUSION

Stephen G. Glatzer has examined

the arguments made in the courts below and his amicus curiae brief does not duplicate the case law which has been presented or that Hydrolevel may be expected to offer. His brief, instead, addresses the problems associated with private standards groups and the small companies that are often the victims of said groups in an antitrust sense. The arguments presented in the annexed brief will not be argued elsewhere as they are argued here.

Stephen G. Glatzer has twice appeared and argued before the United States Court of Appeals for the Second Circuit and has litigated five times before the United States District Court for the Southern District of New York. Although these proceedings were related to the welfare of Emergency Beacon Corporation, they are unrelated to the matters presently at bar. Indeed should

this Court grant the instant motion, Stephen G. Glatzer will be available for questioning on the positions espoused in his brief and answer any inquiry that the Court may put to him. Although not licensed to practice law Glatzer has carried out the "legal" activities enumerated above and has written this brief and motion. During oral argument before the Second Circuit, Glatzer informed the presiding judge of the panel, Judge Oakes, that he was not an attorney. The judge commented, "You wouldn't be aware of it from your arguing ability"; and although this Court may not usually look favorably upon an amicus curiae brief presented by a pro se, in order not to foreclose considerations of a viewpoint that might be helpful to the Court I have asked Harvey S. Barr, Esq., a member of the bar of

the Supreme Court of the United States, to endorse this brief and, if required, adopt it as his own and/or be the attorney of record. Mr. Barr's affidavit is annexed hereto. For all of these reasons Stephen G. Glatzer and Emergency Beacon Corporation request that their motion for leave to file the annexed amicus curiae brief be granted.

Respectfully submitted,

STEPHEN G. GLATZER
Emergency Beacon Corporation
15 River Street
New Rochelle, New York 10801
(914)235-9400
Amicus Curiae

NO. 80-1765

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1980

AMERICAN SOCIETY OF MECHANICAL ENGINEERS,
Petitioner,

v.

HYDROLEVEL CORPORATION,
Respondent

On Writ of Certiorari
To The United States Court Of Appeals
For The Second Circuit

AFFIDAVIT

STATE OF NEW YORK)
) ss:
COUNTY OF WESTCHESTER)

Harvey S. Barr, Esq., being duly sworn and deposed states:

(1) I am an attorney duly admitted to practice before the Supreme Court of the United States.

(2) I am the trustee-in-possession of Emergency Beacon Corporation, said corporation currently being under the protection of Chapter XI of the Rehabilitation Act.

(3) Further, under the leadership of Mr. Glatzer the corporation has successfully proposed and had accepted by a majority (in amount and number) of the creditors, a plan of arrangement.

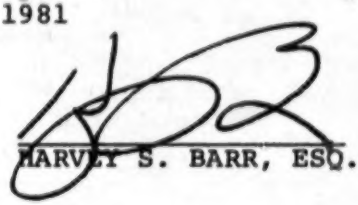
(4) For the past five years I have worked closely with Mr. Glatzer in numerous litigations that have stemmed out of the financial problems of this small but technologically innovative and advanced company. I am familiar with the company's dealings with RTCA, the negative effect certain proposed standards would have on the economic viability of the company, Mr. Glatzer's efforts both as a member of that standards group and as president of Emergency Beacon Corporation, and his testimony on standards and regulatory groups that was given before the Federal Trade Commission.

(5) Further, I have read this motion for the amicus curiae brief and the amicus

curiae brief as well as the applicable papers from the courts below. If this Honorable Court is not disposed to accept Mr. Glatzer's motion for leave to file an amicus curiae brief and the annexed brief and appendix, I willingly and gladly adopt it as if it were my own and will become attorney of record, with respect thereto, for I feel that the viewpoints espoused in the brief should be considered by the Court and the Court's disposition of the Hydrolevel appeal will be a critical factor concerning the survivability of the Emergency Beacon Corporation as well as countless other companies that could be hurt or perhaps forced to go the way of Hydrolevel if there is no mechanism for accountability by the powerful standards organizations that

with one stroke of the pen can "destan-dardize" a company out of existence.

Dated: Spring Valley, NY
October 8, 1981



HARVEY S. BARR, ESQ.

NO. 80-1765

AMERICAN SOCIETY OF MECHANICAL ENGINEERS,
Petitioner,

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HYDROLEVEL CORPORATION,
Respondent

On Writ of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF AMICUS CURIAE, STEPHEN G. GLAZER AND EMERGENCY BEACON CORPORATION

INTEREST OF AMICUS CURIAE

Amicus curiae adopts the statements in paragraphs 1 and 2 of the Motion for Leave to File Amicus Curiae Brief preceding this brief, as showing the interest of amicus curiae.

STATEMENT OF THE CASE

The instant case is one where a standards group allegedly used its power to harm and eventually destroy a small technologically advanced corporation. In the instant case Hydrolevel has alleged

that inaccurate statements made public under the apparent authority of ASME were accepted as gospel by Hydrolevel's potential customers. Relying on said statements the customers ceased to be interested in purchasing Hydrolevel's only product and Hydrolevel was forced out of business.

It is the purpose of this brief to explain what actually happens in standards organizations, in terms of the power these organizations can and do exert in the marketplace, the constant battle among the "voluntary" members of the organization to secure an advantageous position for their sponsor and the effort made by the standards organization to be responsible in the use of its name, prestige and power. It will also attempt to examine the impact of this Court's impending decision in the Hydrolevel appeal. From this posture it

matters little whether the accusations levelled by Hydrolevel against ASME are true or not. What does matter, and what is of tantamount importance to the multitude of small companies and volunteers to standards organizations is the precedent that has been set by the panel of the Second Circuit Court of Appeals and the precedent that will be set by this Honorable Court when it renders its decision.

For purposes of the brief, I assume arguendo that Hydrolevel was damaged by the letter that was written and disseminated on behalf of ASME by Hoyt and instigated by James and Hardin. With these assumptions, we have a situation where there was a dominant manufacturer and supplier in an industry, M&M. A threat was observed to M&M's dominance of the market by a technologically advanced product made by a small company,

Hydrolevel. Aware of the threat, various members of the large company and its allies used the standards group to effectively remove Hydrolevel from the marketplace.

SUMMARY OF ARGUMENT

There is an almost symbiotic relationship between associations such as ASME that set standards and promulgate codes and the manufacturers and marketers affected thereby, such as M&M and Hartford Insurance, (who in reality pay for or otherwise compensate ASME's "volunteer" staff). ASME should be held liable for injury caused to Hydrolevel by the staff volunteers' action, as the Second Circuit decided, for otherwise there will be little or no motivation for the standards associations to monitor and control the awesome power that they possess. Indeed, should the decision of the Second Circuit Court of Appeals be reversed on the theory

espoused by ASME, the resulting immunity would encourage blatant abuse of the power of these standards organizations to oppress competition by small highly-motivated innovative companies, the backbone of the free enterprise system. The result would be a loss of that innovation and creativity that is the root of this country's long-term technological superiority in the world. Therefore, regardless of this Court's opinion of the precise merits of Hydrolevel's damages and ASME's liabilities, it is of tantamount importance that small companies like Hydrolevel not be left totally without recourse against the standards organizations, notwithstanding Congress's direction that the Federal Trade Commission abstain from interfering with said organizations.

ARGUMENT

POINT I

BECAUSE OF THE ALMOST SYMBIOTIC RELATIONSHIP BETWEEN ASME AND THE MANUFACTURERS SUCH AS M&M, WHO IN REALITY COMPENSATE ASME'S "VOLUNTEER" STAFF, ASME SHOULD BE HELD LIABLE FOR THE INJURY CAUSED HYDROLEVEL BY THE VOLUNTEERS' ACTIONS UNDER THE THEORY OF NEGLIGENT LIABILITY IN PERMITTING ITS APPARENT AUTHORITY TO BE ABUSED, AS HELD BY THE SECOND CIRCUIT

ASME's argument before this Court as reflected in its brief, turns on the proposition that ASME the organization cannot be held liable for the injury caused by the actions of individuals Hardin and James. Both men, ASME contends although apparently functioning within their roles as chairman and vice-chairman, respectively, of ASME's Heating and Boiler's Subcommittee, were in reality serving only the interests of M&M, James's true employer. Arguing from the Restatement (Second) of Agency, ASME contends

that for it to be liable, James must have been acting on its behalf and cites several cases espousing this theory. ASME's argument concludes with the observation that Hydrolevel is unable to show that James's or Hardin's conspiratorial activity was intended to benefit ASME.

As an active member of RTCA, a similar standards organization, I suggest that ASME's conclusion is wrong. ASME may not have received benefits per se from the activities of James and Hardin, but that is not the issue. These men were not engaging in isolated machinations. As mentioned before, I am a member of a volunteer standard setting organization, RTCA, and the president of a corporation, EBC, that must compensate the volunteers that I send to work at RTCA. I am fully aware, therefore, as are virtually all other active

members of standards organizations, that the volunteer staff constantly attempts to utilize the organization to either protect or advance the economic interest of their "true" employers. The standards organization (and ASME is certainly no exception) condones such actions to guarantee a flow of "volunteer" labor. Accordingly, the benefit ASME received, although somewhat intangible, is a benefit it sorely needs and it must, therefore, be held liable for the injury caused by volunteer staff acting under its authority. The intangible benefit is the good will of those manufacturers and marketers that it requires to survive. The power of ASME and associations like it is predicated upon its standards and code writing activites. These activities regulate the manufacture and distribution of products to a far greater extent than even the rules promulgated by governmental bodies. However, this power is

fueled by the labor of many individuals. It obviously requires an extremely large staff of expert engineers and others to adopt and revise the approximately four hundred codes and standards which are the responsibility of an organization such as ASME.

ASME could obviously not afford to hire the necessary staff to accomplish this task. It is, indeed, dependent upon the largess of the private manufacturers and marketers that it "regulates." RTCA and all the other standards organizations are no exception. They all have stated in great detail how without a huge number of highly paid volunteers it would be impossible to regulate and promulgate the various codes and standards that are necessary to make their subject products safe, fit together, and perform as expected in this complex technological

society we live in. Such complete dependence on the free services of the manufacturing and marketing members of the organization unfortunately creates an unholy alliance of interest. Private industry, the manufacturers and marketers are willing to subsidize their employees to work in ASME and other standards organizations if, and only if, it will advance their own economic interests. Indeed, considering the huge sums of money that must be spent to subsidize the volunteers, it may well be considered corporate waste and a breach of the fiduciary relationship between the officers and directors of a corporation and its stockholders if the former would authorize payment of salary and expenses to employees engaged in ASME or other standards organizations businesses if a benefit did not inure to the corporation. I believe this Court can take judicial notice that most stockholders prefer

receiving dividends to the moral reward of knowing that their corporation was a contributor to the public good.

Stated more specifically, an employee who "volunteers" will be able to participate in writing the codes and standards to advance the economic interests of the employee's actual employer at the expense of the employer's competition. Unfortunately, this is the lure that the standards organizations use to bolster their staff. I am only asking that in return the organizations retain responsibility for their actions.

The employee who "volunteers" to aid the standards groups in writing and revising the code gladly accepts the assignment knowing full well that by participating in and by gaining influence in an organization such as ASME he will increase his value to his employer and will advance up the cor-

porate ladder. In the instant case James, for example, received a salary of only $20,000.00 per annum from M&M during the year 1971 and yet he received bonus payments of more than $60,000.00 in 1971, a sum triple his salary, (HX V. 82) (P.8, Hydrolevel's Brief to the Second Circuit Court of Appeals) as a result of the value that M&M placed on his ability to influence ASME's activities affe ing M&M's interests. The 1973 M&M memorandum HX V. 61-63) synopsized on page 9 of Hydrolevel's brief to the Second Circuit Court of Appeals amply demonstrates this principle:

> "A major reason for the continued success of M&M is a result of (James's) efforts and skill in influencing the various code making bodies to 'legislate' in favor of M&M products. This has been a planned strategy for the business under E. N. McDonnell and carried out with considerable success as evidenced by the M&M market penetration of 70 plus %...

> It is of vital importance to M&M to maintain the continuity of John's influence as above.... In this circumstance his seniority is a distinct plus for both experience and influence."

Thus in this case, as in the case of the countless other standards organizations for which this amicus curiae speaks, a community of interest is created between ASME and its "volunteer" staff, and the manufacturers and marketers who employ and subsidize the agency's volunteers. This alliance is not unique but is a natural consequence of a system where a regulator is dependent upon those it regulates to compensate the staff which it needs to develop the regulations. What James and Hardin did was perhaps more blatant than the average method but was nonetheless standard operating procedure in standards writing organizations such as ASME.

As an example, very often a code writing committee in a standards organization will adopt a standard which is, in fact, a particular characteristic of one specific product. This standardization obviously gives the established company a competitive advantage over a possible newcomer. As an example, at the last meeting of the RTCA committee on emergency beacons, of which I am an active member, a new test was proposed to measure the survivability of an "emergency beacon." This is a device that is mandated to be carried on most aircraft, pursuant to the OSHA law enacted by Congress. The beacon is basically an automatic SOS transmitter which is designed to survive a crash and emit a signal to aid search and rescue teams. In this particular instance, I stated at the

meeting that the survival test that was being proposed was overly severe and not realistic or representative of forces that had been observed in any of the many, many documented crashes that I and other members of the committee had seen. Almost instantly most members of the committee turned on me and said: "Why are you objecting? Your product meets this test." This illustrates the fact that the standards committees have taken as an intrinsic operating principle that they should not promulgate any standard that their active member's products will not meet. Additionally, the Court's attention is directed to the amicus curiae brief of the Legal Foundation of America who, on page 8, accurately suggests that the natural tendency of professions is, and I believe should be, to set standards accommodating the lowest

safe common denominators and that this tendency would be encouraged by the Court of Appeal's opinion, should it be sustained.

In the current case the purpose of the low water cut-off valve was simply to prevent the dry fire type accident explosion and, as such, any device that functioned reliably in that regard should be acceptable whether the consumer opts to be penny-wise and pound foolish, such as by purchasing the lowest quality device that meets the standard and requires replacement at frequent intervals, or whether he opts to buy the most expensive, super deluxe unit that will last, not only the lifetime of his boiler but the lifetime of his children and their children. It is the consumer's right to make that decision. If the standards organization forces the consumer to buy something that is above and beyond his re-

quirement and above and beyond the requirements of safety, then the standards organization has ceased to be a standards organization and has become an organization that not only seeks to restrain trade but seeks to deprive the consumer from having a full and effective choice in the marketplace, and is merely a tool of the established companies.

It is important, at this point, to examine the composition of the very specialized groups that write codes. Invariably they are dominated by representatives of the manufacturers of the various types of products and in many instances also by agencies that are concerned with the regulations such as insurance companies, entities responsible for building codes, etc. People who have highly specialized knowledge of a particular narrow field are essential to the drafting of meaning-

ful and effective codes in those specialty areas. But the very fact that they have this unique insight into a narrow area of technology also makes them quite conversant with the ramifications of their decision. From my experience I can state that it is more likely than not that when the committee members of ASME were discussing the time delay that they knew precisely that the time delay was a characteristic unique to Hydrolevel's probe and not at all applicable to the M&M float valve. In an analogous situation where the RTCA committee originally decided that a feature of our emergency beacon, that of an internal antenna, was inferior there was no question in anyone's mind as to what company used the internal antenna and what companies used the external antenna, the established approach. Indeed, as the testimony that I gave before the Federal Trade Commission in docket 215-61 Proposed Trade

Regulation Rules Standards and Certification on Tuesday, September 11, 1979, between pages 10431 and 10463, indicates,initially the committee used such arguments as "it is intuitively obvious that the internal antenna will not work as well as the external antenna." Due to the pressure exerted by my mere testimony before the Federal Trade Commission and my active participation on the Committee, it was resolved that the question be solved, not by speculation, but rather by examining systematically the history of crashes and failure reports and that measurements be conducted by a governmental agency, NASA. The end result was that the crash data indicated that there was not one single instance documented of a failure of the internal antenna unique to our product and that approximately 11% of the documented failures of <u>other</u> manufacturer's

products was due to a failure of the external antenna or the coaxial cable necessarily connecting to it due to the forces of a crash. Similarly detailed studies conducted by NASA indicated that the signal transmission capability of our internal antenna and the more widely used external antenna in a crash situation were comparable. If the precedent established in the instant case by the Second Circuit is allowed to stand by this Court, the RTCA would be more careful in the future before ruling out the use of a product without proper evidence and testing. RTCA, who would now be responsible,would monitor the "volunteers" who were employed by companies that made emergency beacons with external antennas with heightened concern knowing that without any scientific evidence on which to base a proposed rule rejecting the internal antenna and with full knowledge that the rule was being proposed solely to

strengthen the competitive position of the external antenna beacon manufacturers to the detriment of EBC, would not move so hastily to promulgate the restrictive rule without valid scientific evidence if they could be found negligently liable. On the other hand, should this Court reverse the Second Circuit, thereby immunizing standards organizations, what motivation would the members of the standards committee have to ever consider the anti-competitive effect of what they were doing? With virtual immunity, why should they otherwise be motivated to do other than promote the economic interest of their employers, notwithstanding the fact that in order to achieve this they might have to compromise their true purpose of establishing safe and fair standards in order to satisfy those manufacturers with the most

financial clout.

Notwithstanding all of the above logic ASME attempts to picture itself as a public service, not-for-profit association who has been betrayed by a few members of its volunteer staff. In fact, as unfortunately every standards organization including ASME is well aware, public service is but a veneer, and stripping it away reveals that ASME, as are many of the other organizations, is used as a tool to whatever extent possible by the large corporations who subsidize its volunteers, and are often able to offer employment to governmental and insurance company committee representatives when they retire. The manufacturers' and marketers' interest usually predominates. ASME and the other standards organizations benefit by involvement in the system. They are able to survive. They are also able to maintain their power. However, power carries with it responsibilities

and accordingly ASME should be held liable for the injury caused Hydrolevel by James and Hardin through the use of their status of chairman and vice-chairman of the ASME Boiler Safety Committee. It is axiomatic that if James stood up on a large soap box and proclaimed to the world that the Hydrolevel device was inferior and only his float level device was safe, the world would take that with a grain of salt. But when such a statement can be made behind the deceptive and protective veneer of a standards organization that represents itself as unbiased and solely interested in the public safety, such a statement derives a potency sufficient to destroy a competitive corporation as it did in the instant case to respondent Hydrolevel.

Petitioner, ASME, and its supporters are fond of quoting De Tocqueville as

authority for the positive and particularly American character of voluntary associations.

However, De Tocqueville, unlike petitioner, astutely distinguished between voluntary associations of feeble but independent individuals and a voluntary association composed of several powerful partners, each supplying a retinue of retainers. It is the former association which De Tocqueville denominated as being indigenous to a democratic society and particularly American. The latter type of association he described as native to aristocratic society. See De Tocqueville Democracy in America (Mentor Books, 1956), pp. 198-200, Appendix, p. A-13-22.

Which type of association is ASME? This amicus curiae believes in the Hydrolevel situation and in other similar abuses that the petitioner (and other

standards and certification organizations) can be dominated by a few powerful marketers and manufacturers. These aristocrats, by subsidizing their retainers' (employees') voluntary service tend to dominate the association. ASME in the instant matter is the perversion rather than the embodiment of the American ideal.

POINT II

THE AMICI CURIAE BRIEFS THAT HAVE BEEN SUBMITTED BOTH IN THE WRIT FOR CERTIORARI AND ON THE INSTANT APPEAL PRIMARILY COME FROM STANDARDS ORGANIZATIONS BUT ARE NOT NECESSARILY REFLECTIVE OF THE VIEWPOINT OF MEMBERS OF SAID ORGANIZATIONS

As I have indicated in my brief, my viewpoint as a member of a standards organization is somewhat different than the viewpoint of the administration of the organization. An editorial in the September 16th issue of EDN, an approximately 200-page bi-weekly magazine with

a controlled subscription that is sent primarily to working engineers in the electronics field many of whom are members of IEEE, (one of the amici curiae who submitted a brief to the Court).

The editorial by Roy Forsberg, the editorial director, reproduced and attached hereto (A-23-27) speaks to the issue that the IEEE amicus curiae brief does not necessarily represent the feelings of the members of the IEEE and in representing that viewpoint suggests that if a society accepts the responsibility of setting industry standards and/or regulations it must be willing to be held accountable for its actions and the actions of its members it appoints to key committees. It urges that IEEE withdraw its amicus curiae brief. The editorial obviously rings true to many of the principles I have espoused in my brief and additionally might point out that at one

time I and the now vice-president of Emergency Beacon Corporation were members of IEEE. We both, long ago, let our memberships lapse, for essentially the reason that we never felt that the organization was truly responsive to our needs as working engineers.

POINT III

HOLDING THE INDIVIDUAL VOLUNTEERS OR THEIR TRUE EMPLOYERS LIABLE FOR ABUSES SUCH AS WERE PERPETRATED ON HYDROLEVEL WOULD NOT PROVIDE EFFECTIVE REDRESS TO THE VICTIM

The loopholes and fraudulent schemes that could be perpetrated to misuse the power of the standards groups such as ASME are endless, and justice can only be done by pinning the responsibility on the ultimate holder of power which is the standards organization. If indeed the organization has the expertise

to write knowledgeable effective standards, such as the ASME brief and the numerous amici curiae briefs from the other standards organizations claim, that knowledge and ability is also capable of safeguarding against abuses of the type that is alleged that ASME, M&M and Hartford perpetrated on Hydrolevel. The key proposition that has been overlooked in the briefs that I have seen below, is the attitude of the innocent volunteer, and speaking as one, I know that I would be much more concerned about my volunteer work in RTCA if I felt that an innocent slip on my part could make me or my company liable for a suit that could wipe us out. I alone, as is the case with most volunteers, do not always have enough of the complete picture to be absolutely sure that what I propose is immune from any damaging antitrust effect on competitors that I may not be personally aware of.

However, this is not the case when we deal, not with the individual volunteers that ASME and its proponents would make liable, but the committees as a whole whose collective wisdom often incorporates the total sum of wisdom in the specialized narrow area for which the committee seeks to regulate and promulgate standards. The answer is not to make the volunteers personally liable. The answer is not to eliminate private standards organizations and saddle the government with the burden of regulation. I think it is the spirit of the times and certainly the present Congress has espoused the fact that it would like to see government get out of the regulation business as much as possible. Therefore, the only effective safeguard is to make the people who promulgate the regulations liable

for misuse of their power. Again, by pinning the responsibilities on the volunteers, it will become a self-fulfilling prophecy that nobody will want to volunteer.

If the liability would go to the volunteer, or the volunteer's actual employer nothing would prevent fraudulent schemes from rendering those entities judgment-proof.

The following is an example of a judgment-proof situation, where either the individual volunteer or his employer would be liable. If it were common knowledge that employers were liable in this regard, it would be easy to set up paper corporations for the purpose of "employing" the individuals who would be the volunteers working for the standards organizations, even though their <u>true</u> employer would be the major company whose interests the volunteer is representing.

The paper corporation would have little or no assets, and the volunteer could easily have his finances arranged to be effectively judgment-proof. Since in our example the standards organization (which would be the case if this Court reverses the Second Circuit) is not liable, the end result is that the small aggrieved company whose products are improperly closed out of the market by the standards organizations, has no effective recourse, even if it acquires a judgment in an antitrust action. I am sure that as the dollars increased more talented minds would be able to create more complex methodologies and scenarios. Suffice to say the standards generator has the power to abuse and must also have the liability for the abuse.

Assuming arguendo the danger of judgment-proof volunteers and actual

employers and assuming arguendo the Court reverses the Second Circuit's theories of liability to the standards organization, the sole remaining check upon the power of the code and standards organizations such as ASME would thereby be removed. For even despite the testimony elicited during the hearings before the subcommittee on antitrust and monopoly of the Senate Committee on the Judiciary in 1976 on voluntary industrial standards, legislation regulating associations such as ASME was not enacted. Notwithstanding further testimony before the Federal Trade Commission (see Standards and Certification Proposed Rule and Staff Report, Bureau of Consumer Protection, December 1978) a proposed rule imposing due process requirements on code and standards organizations such as ASME did not come about. The reason it didn't was twofold. One, due to an intense lobbying effort by the so-

called public spirited code and standards association such as ASME, the proposed regulator, the Federal Trade Commission, was almost abolished. Secondly, it appears to be common wisdom that the Federal Trade Commission is alive today only because it voluntarily backed off from most of its targets and programs, including jurisdiction over the code and standards associations such as ASME. Congress, however, attempted to fill the vacuum by suggesting that private antitrust litigation would be the mechanism for redress of abuses. Should the Second Circuit's decision here be affirmed by this Honorable Court it will serve to deter the code and standards associations, such as ASME, from the naked exercise of their power on behalf of those large manufacturers and marketers which subsidize its activities by compensating

"volunteer" staff.

If this check is removed, there is no question that severe injury to competition and innovative technology will occur.

CONCLUSION

For all of the above this amicus curiae respectfully urges that this Court affirm the decision of the United States Court of Appeals For The Second Circuit on the issue and theory of liability of the ASME to Hydrolevel Corporation. Or, in the alternative, if this Court is convinced that the particular facts in this particular case do not support a decision in favor of Hydrolevel, that the principles articulated in this brief not be brushed aside and the Court, in its wisdom, add such words as necessary in its decision so that an abusive power of the type alleged by Hydrolevel and spoken

to by this amicus curiae have some method of redress. For by reversing Hydrolevel, even if said reversal is only on the facts and not the law, and the Court thereby does not reach the issue of liability under the facts as found by the Second Circuit, a grave injustice will be done and the matter will rise again to be adjudicated by the Courts of the land.

Respectfully submitted,

STEPHEN G. GLATZER
President
Emergency Beacon Corporation
15 River Street
New Rochelle, New York 10801
(914)235-9400
Amicus Curiae

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INTRODUCTION TO APPENDIX

As previously pointed out I gave testimony before the Federal Trade Commission concerning the wisdom of their proposed regulation of the private standards-making groups. The entire transcript of my testimony and of the examination by Mr. William Rockwell, of the American National Standards Institute, is available from the Federal Trade Commission and, if desired by the Court, a transcript would be made available upon request. I have, therefore, elected not to go to the great expense of having the transcript retyped in the format required by this Court and rather will reproduce here several of the salient comments that I think speak to the heart of the instant issue.

On Page 10432 of the transcript I was addressing the commission and commen-

ting on the fact that there had been serious failures in many of our competitor's emergency beacons and that approximately one-third of them had been withdrawn from the market and there were many planes flying without the protection of these emergency SOS transmitters. Specifically, on that page, I said:

> "We haven't had that problem with our design and yet now we are being precluded from the marketplace by virtue of a new standard that is being generated which specifically outlaws a number of the features that have directly contributed to our excellent record of doing the intended job. The standards in this case are promulgated by RTCA, Radio Technical Commission for Aeronautics. RTCA is a private standards group that has participants from industry, government and the international community, and although the standards developed by RTCA are not law in themselves, RTCA has a special advisory status with the Federal Aviation Administration and the reality is that their standards are generally adopted virtually verbatim."

I then proceeded to detail some of my experiences with RTCA and referring to page 10434, I commented:

> "When the original RTCA committee met back in 1972 I was a very active participant on the committee and I pointed out several areas where I saw that there would be future problems; these being the antenna, the amount of power required, and the forces required to activate the beacon in the event of a crash. Because of the nature of RTCA, my ideas and those of the people that supported me were not adopted. We were a minority opinion and in the grinding pressure to achieve a consensus opinion I feel unwise compromises were made. I also noted that they tended to occur at the end of a session on a Friday afternoon. But the most critical problem was that once adopted there was no appeals mechanism for minority opinion. Indeed, the positions adopted were often less based on good fact or evidence but rather on the tenacity of a few that molded the consensus and often, and I maintain those three instances that I've indicated here, history has shown that the best set of standards did not come about. In brief, the adoption of those standards resulted in many beacons not functioning

> when there were crashes. They failed because the power requirements were set at a level 25 times higher than that recommended by the granddaddy of all standards organization, the National Bureau of Standards."

Needless to say, should this Honorable Court affirm the Second Circuit, it is my belief that the pressure that would be brought to bear on the private standards organizations from the standpoint of potential negligent liability would force standards to be more closely connected to the salient factors determining product safety than on the economic interests of a few, as unfortunately has been the case many times in these organizations.

Even the threat of the Federal Trade Commission being a "court" of last resort to prevent abuses of a standards organization seemed to work, at least in my case. In returning to

the transcript and quoting from page 10436,

> "I believe that the mere fact that this legislation is being proposed enables me now to be in the position where this private developer of standards now finds that his standard does not exclude my beacon. In all fairness, and I must point out that the final word does indeed rest with the FAA, when previously RTCA outlawed our antenna we went to the FAA and at great expense and a great effort proved to the FAA that our antenna system was acceptable and that the FAA granted us a special waiver and on the strength of that waiver we were able to legally produce these beacons. But because we never fully complied with the standards developed by RTCA, the major manufacturers, Piper, Beech, Cessna, the people that make the vast majority of the small planes, never adopted our beacon. After all, why take a beacon that doesn't meet the standards and is legal by virtue of a waiver when you can have the real thing?

Obviously, in some industries, that type of pressure is either not usually within the capability of the small firm.

Similarly, in Hydrolevel's case, boiler manufacturers and other major potential customers of Hydrolevel were not convinced that the Hydrolevel device worked even after the retraction letter published by ASME. Such is the power of the standards groups.

When the subject of the proposed regulation by the Federal Trade Commission was brought up, RTCA reacted much in the manner of the other private standards groups that have made their views known in the amici curiae briefs submitted to this Court. That is to say they claim that any sort of regulation, responsibility or due process would cause their entire organization to fall into bankruptcy. That came up on page 10442, where I was questioned by Mr. Bruce Silverglade of the Federal Trade Commission and quoting there, Mr. Silverglade said,

"My other question concerns page 17 of your statement. There you state that you were invited to the office of Mr. William Fuchs, and he told you that he was in charge of RTCA's response to the FTC's proposed rulemaking. And you state that he was very upset and said that the proposed rule would bankrupt their standards organization."

and on page 10443, I quote my response,

"No, he didn't. It was generalities, and I think probably, in all fairness, that was the heat of emotion. And I feel I have to point this out. There has been a substantial change that I have noticed in RTCA at the last meeting. We are now, instead of voting by consensus, we are going out now -- the FAA funded NASA to do studies on some of these areas, and we are taking a look at these studies and putting in hard evidence. I don't know whether this was a slip of the tongue, but at that meeting somebody said hypothetically if we had a deadlock and no clear majority, the executive committee would be the appeals board. So I think RTCA, who I think sincerely wants to do the right thing, is already starting to implement some of these things, and I suspect at very negligible cost."

My purpose in drawing the Court's atten-

tion to this statement is that it takes very little pressure to have the standards organizations become responsible for the awesome power that can emanate from them. Such mechanisms as having appeals boards, executive committees, issuing minority reports, etc., are simple and easy and the failure to do this, in addition to allowing the standards committee to espouse a standard that effectively excludes several manufacturers from the marketplace is, I believe, unquestionably an act of negligent liability and one for which the standards organization should be responsible.

I think that one of the most important aspects of the position espoused by the various standards amici curiae briefs was the fact that any sort of regulation or responsibility would be terribly burdensome and when

faced with the possibility of Federal Trade Commission intervention, ASME through Mr. Rockwell, I think put the issue in prospective when on page 10461 he said,

> "Let me ask you one other question. Concerning the rule itself, you understand that this rule imposes upon all standards groups a very heavy regulatory authority, a lot of rules and regulations. And would you accept, instead of that, perhaps a good appeals mechanism by an appropriate group, whether it be the Department of Commerce or American National Standards Institute? If that could be set up in lieu of heavy government regulation, would you consider that?"

to which I replied,

> "In general, yes. I am one of these people that believe the less regulation we have, the better. I believe abolishing the CAB is a way to have lower air fares and increase competition. But what you need is some mechanism where if the standards committee isn't responsive, that it has to say why, and if you disagree with the why you have to go to an impartial agency someplace. A lot of other things perhaps

are not necessary, but that is my feeling."

whereas Mr. Rockwell responded,

"Thank you very much. Those are the only questions I have."

As previously emphasized, the proposed stop-gap of the Federal Trade Commission doesn't exist. Indeed, in checking with the Federal Trade Commission it seems that the precise situation with regard to regulation is very hazy but the people I spoke to generally agreed that it was apparent that Congress intended to discourage the FTC from moving in this regard to regulate the private standards groups and wanted to encourage private antitrust actions. There was also agreement that should the Supreme Court reverse on the principles espoused by Second Circuit in Hydrolevel there would well be no avenue of redress at all.

EXCERPTS FROM DEMOCRACY IN AMERICA
by Alexis de Tocqueville
Edited by Richard D. Heffner

"29. OF THE USE WHICH THE AMERICANS MAKE OF PUBLIC ASSOCIATIONS IN CIVIL LIFE

I do not propose to speak of those political associations by the aid of which men endeavor to defend themselves against the aggressions of regal power. That subject I have already treated. If each citizen did not learn, in proportion as he individually becomes more feeble, and consequently more incapable of preserving his freedom single-handed, to combine with his fellow-citizens for the purpose of defending it, it is clear that tyranny would unavoidably increase together with equality.

Those associations only which are formed in civil life, without reference

to political objects, are here adverted to. The political associations which exist in the United States are only a single feature in the midst of the immense assemblage of associations in that country. Americans of all ages, all conditions, and all dispositions, constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds, --religious, moral, serious, futule, general or restricted, enormous or diminutive. The Americans make associations to give entertainments, to found seminaries, to build inns, to construct churches, to diffuse books to send missionaries to the antipodes; they found in this manner hospitals, prisons,

and schools. If it be proposed to inculcate some truth, or to foster some feeling by the encouragement of a great example, they form a society. Wherever, at the head of some new undertaking, you see the government in France, or a man of rank in England, in the United States you will be sure to find an association.

I met with several kinds of associations in America of which I confess I had no previous notion; and I have often admired the extreme skill with which the inhabitants of the United States succeed in proposing a common object to the exertions of a great many men, and in inducing them voluntarily to pursue it.

I have since travelled over England, whence the Americans have taken some

of their laws and many of their customs; and it seemed to me that the principle of association was by no means so constantly or adroitly used in that country. The English often perform great things singly, whereas the Americans form associations for the smallest undertakings. It is evident that the former people consider association as a powerful means of action, but the latter seem to regard it as the only means they have of acting.

Thus, the most democratic country on the face of the earth is that in which men have, in our time, carried to the highest perfection the art of pursuing in common the object of their common desires, and have applied this new science to the greatest number of purposes. Is this the result of accident? or is there in reality any necessary connection between the principle of associa-

tion and that of equality?

Aristocratic communities always contain, amongst a multitude of persons who by themselves are powerless, a small number of powerful and wealthy citizens, each of whom can achieve great undertakings single-handed. In aristocratic societies, men do not need to combine in order to act, because they are strongly held together. Every wealthy and powerful citizen constitutes the head of a permanent and compulsory association, composed of all those who are dependent upon him, or whom he makes subservient to the execution of his designs.

Amongst democratic nations, on the contrary, all the citizens are independent and feeble; they can do hardly

anything by themselves, and none of them can oblige his fellow-men to lend him their assistance. They all, therefore, become powerless, if they do not learn voluntarily to help each other. If men living in democratic countries had no right and no inclination to associate for political purposes, their independence would be in great jeopardy; but they might long preserve their wealth and their cultivation: whereas, if they never acquired the habit of forming associations in ordinary life, civilization itself would be endangered. A people amongst whom individuals should lose the power of achieving great things single-handed, without acquiring the means of producing them by united exertions, would

soon relapse into barbarism.

Unhappily, the same social condition which renders associations so necessary to democratic nations, renders their formation more difficult amongst those nations than amongst all other. When several members of an aristocracy agree to combine, they easily succeed in doing so: as each of them brings great strength to the partnership, the number of its members may be very limited; and when the members of an association are limited in number, they may easily become mutually acquainted, understand each other, and establish fixed regulations. The same opportunities do not occur amongst democratic nations, where the associated members must always be very numerous for their association to have any power.

I am aware that many of my countrymen are not in the least embarrassed by this difficulty. They contend, that, the more enfeebled and incompetent the citizens become, the more able and active the government ought to be rendered, in order that society at large may execute what individuals can no longer accomplish. They believe this answers the whole difficulty, but I think they are mistaken.

A government might perform the part of some of the largest American companies; and several States, members of the Union, have already attempted it; but what political power could ever carry on the vast multitude of lesser undertakings which the American citizens perform every day, with the

assistance of the principle of association? It is easy to foresee that the time is drawing near when man will be less and less able to produce, of himself alone, the commonest necessaries of life. The task of the governing power will therefore perpetually increase, and its very efforts will extend it every day. The more it stands in the place of associations, the more will individuals, losing the notion of combining together, require its assistance: these are causes and effects which unceasingly create each other. Will the administration of the country ultimately assume the management of all the manufactures which no single citizen is able to carry on? And if a time at length arrives when, in consequence of the extreme subdivision of landed property,

the soil is split into an infinite number of parcels, so that it can only be cultivated by companies of husbandmen, will it be necessary that the head of the government should leave the helm of state to follow the plough? The morals and the intelligence of a democratic people would be as much endangered as its business and manufactures, if the government ever wholly usurped the place of private companies.

Feelings and opinions are recruited, the heart is enlarged, and the human mind is developed, only by the reciprocal influence of men upon each other. I have shown that these influences are almost null in democratic countries; they must therefore be artificially created, and this can only be accomplished by associations."

EXCERPTS FROM EDITORIAL
"IS THERE NO LIMIT TO IEEE'S ARROGANCE?

by Roy Forsberg
Editorial Director

"Because of IEEE's apparent unwillingness over the years to represent the best interests of the bulk of its membership--working engineers--many of its members have dropped their affiliation. Additionally, many other engineers have refused to join at all. However, "unwillingness" (translate to "unresponsiveness") might be too kind in describing the Board of Directors's latest move. "Arrogant" is closer to the mark.

Once again, without consulting IEEE's membership, the Board has taken an action that appears to be self serving and ill advised. In the name of IEEE, it has filed a brief with the US Supreme Court supporting the contention of ASME (the

American Society of Mechanical Engineers) that engineering societies should be exempt from the Sherman Anti-Trust Act.

ASME's appeal to the Supreme Court stems from a lower court's ruling that ASME members conspired with a manufacturer of boiler safety equipment when they met with that manufacturer and then issued a statement on ASME letterhead implying that another manufacturer's safety device did not meet ASME's boiler-code regulations. In reality, the device did meet the regulations. The second company claimed that this letter affected sales, forcing it to go out of business. The court agreed and awarded the firm $9.9 million in the resulting suit against ASME.

The basis for ASME's appeal and

IEEE's brief is that the society's committees consist of volunteers who should not be held accountable for their actions in the name of ASME. IEEE contends, "Indeed, a rule of strict liability may herald the curtailment of beneficial professional society programs in any case where organizational procedures theoretically may be abused by volunteer members for individual commercial advantage. In a large society such as IEEE, a significant number of such programs may be jeopardized, in spite of the existence of reasonable, workable procedural controls, because of the impossibility of policing all society members' conduct."

EDN believes that this position is a foul-smelling smokescreen. The fact that

committee members are volunteers should have no bearing on their accountability. They can do the same amount of harm (or good) whether they're paid or not. And if a society accepts the responsibility of setting industry standards and/or regulations, it must be willing to be held accountable for its actions and the actions of the members it appoints to key committees.

IEEE's Board consists of company executives and academics. It has rarely been accused of taking stands that benefit the membership when such stands conflict with its members' interests. The Board's actions have remained true to form in this case.

EDN urges IEEE to withdraw its brief. The engineering profession

will never attain the respect and stature it strives for if it refuses to be held responsible and accountable for its actions."

Roy Forsberg
Editorial Director

EDN September 16, 1981

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No. 80-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,
Petitioner,

v.

HYDROLEVEL CORPORATION,
Respondent.

BRIEF OF THE INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS, INC. AS *AMICUS CURIAE*

ROBERT J. SILVERS
Attorney for
The Institute of Electrical and Electronics Engineers, Inc.
30 Rockefeller Plaza
New York, New York 10112
(212) 489-4100

Of Counsel:

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
30 Rockefeller Plaza
New York, New York 10112

Questions Presented

1. Whether a national not-for-profit professional society should be held strictly accountable in treble damage liability under Sections 1 and 2 of the Sherman Act based upon conduct, neither authorized nor ratified by the society, of disloyal volunteer members acting within their apparent authority solely for their own benefit.

2. Whether a national not-for-profit professional society's unintentional participation in a conspiracy to restrain and monopolize trade is a sufficient predicate for the imposition of treble damage liability on the society under Sections 1 and 2 of the Sherman Act.

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United States v. *Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) 13

United States v. *Ridglea State Bank*, 357 F.2d 495 (5th Cir. 1966) 14

No. 80-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,

Petitioner,

v.

HYDROLEVEL CORPORATION,

Respondent.

BRIEF OF THE INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS, INC. AS *AMICUS CURIAE*

Interest of the *Amicus Curiae*

The Institute of Electrical and Electronics Engineers, Inc. ("IEEE" or "Institute") submits this brief *amicus curiae*, with the consent of all parties, in support of reversal of the judgment of the United States Court of Appeals for the Second Circuit entered November 24, 1980. The Court of Appeals held a sister professional society, The American Society of Mechanical Engineers, Inc. ("ASME" or "Petitioner"), liable to account in treble damages under the Sherman Act because of misconduct of two of ASME's 100,000 volunteer members who acted within their apparent authority, without regard to whether their conduct was carried out for ASME's benefit or was ratified by it.

The decision of the Second Circuit poses serious and important policy, practical and operational implications

for IEEE. IEEE is the world's largest engineering society with over 200,000 individual members engaged in a broad range of technical and professional activities, including the development and issuance of voluntary standards, which are designed to advance the theory and practice of electrical and electronics engineering and the allied arts and sciences. The erroneous and unsound rule articulated in the Court of Appeals' opinion subjects professional societies to a species of strict liability in antitrust cases and threatens curtailment of the useful, voluntary standards, technical, publication and educational programs such societies undertake for their good and the public interest.

Opinion Below

The opinion of the Second Circuit Court of Appeals is reported at 635 F.2d 118 (2d Cir. 1980), and appears in the Appendix to ASME's petition for a writ of certiorari at A-1 to A-26.

Statutes Involved

The statutes involved in this case are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1970). These statutes are set forth in full in the Appendix at the end of this brief.

Statement of the Case

ASME is a non-profit technical and scientific society established in 1880 for the purpose of enhancing the use of mechanical engineering in the public interest. ASME has more than 100,000 individual members drawn from industry, academia, government, insurers and consumer groups. It conducts educational and research programs,

publishes a national magazine and a number of research journals devoted to mechanical engineering, and, most important for this case, issues and renders interpretations on over 400 codes and standards designed to improve public safety and promote uniformity. These codes and standards, which are written, revised and interpreted by over 10,000 ASME volunteers, do not have the force of law, though they have been incorporated by reference into many federal, state and local laws, regulations and ordinances.

One of the oldest ASME codes is the Boiler and Pressure Vessel Code (the "B-PV Code"), which defines standards of construction and performance for various components of steam and hot water boilers and other pressure vessels. The first B-PV Code was promulgated in the early part of this century when boiler explosions attributable to poor design or inadequate safety precautions frequently caused death, injury and property damage. (J.A. 928-29).* Section IV of the B-PV Code, which deals with heating boilers, has been adopted in 46 states and all Canadian provinces. (PX 30A at Exh. H, pp. 2-3). Since the promulgation and acceptance of the B-PV Code, boiler explosions have been all but eliminated. (J.A. 929).

Interpretations of ASME codes are provided free to members and nonmembers as a public service. Under procedures set forth in ASME's bylaws, requests for interpretation are referred to the ASME committee responsible for the code in question. The committee, following its own internal procedures, may respond to properly phrased inquiries in writing. ASME receives approximately 20-30,000 such inquiries each year regarding the B-PV Code alone. (J.A. 861). The Boiler and Pressure Vessel Committee ("the B-PV Committee") supervises and interprets the

* The record references in this brief are to the Appendix filed in the Second Circuit Court of Appeals.

B-PV Code and also oversees the Section IV Subcommittee responsible for that section. In answering questions concerning an interpretation of a code, ASME and its committees do not approve, recommend or endorse proprietary or specific designs; instead, they deal only with principles of acceptable levels of safe operation. Thus, letters of inquiry which can only be answered by addressing the acceptability of a particular device or design are not answered by ASME. (AX V.191; J.A. 732-33).

The focus of this case was the improper issuance and later misuse of one letter written by an ASME volunteer interpreting an ASME standard of performance for low-water fuel cut-offs, a safety device incorporated in steam and hot water boilers. Boilers generally include a device that automatically cuts off the fuel supply and shuts down the boiler before the water in the boiler falls to a dangerously low level. If a cut-off device fails, it may result in "dry firing," that is, boiler operation without a sufficient supply of water to moderate the temperature. Dry firing can easily result in an explosion causing injury to persons or property. (J.A. 169, 928).

Fuel cut-offs customarily have operated on a "float" principle. If the water in a boiler drops below a critical level, the float falls, tripping a switch which cuts off the fuel supply. For many years, McDonnell and Miller, Inc. ("M&M"), which manufactured a float-type cut-off device, accounted for most American sales of this product. In 1965, respondent Hydrolevel Corporation ("Hydrolevel") began manufacturing an electrically activated cut-off of the so-called "probe" variety. With a probe cut-off, when water in the vessel is maintained at a certain level, water covers an electrode completing a circuit activating the fuel supply. If the water level falls below the electrode, the circuit

is broken and the fuel supply is terminated. A difficulty with the probe cut-off, when used in a steam boiler, is that bubbling or surging of the boiling water may intermittently activate the cut-off and cause rapid fluctuations in the fuel supply. For this reason, certain Hydrolevel models for residential steam boilers incorporated a "time-delay" element to prevent temporary fluctuations in water level from cutting off the fuel supply. (J.A. 161-62; DX BN, pp. HT 1268-69).

In March of 1971, James Solon, President of M&M, Eugene Mitchell and John James, Vice-Presidents of M&M, and T. R. Hardin, an Executive Vice-President of Hartford Steam Boiler Inspection and Insurance Company ("Hartford"), dined together in Chicago. At the time, James and Hardin were also active as ASME volunteers, Hardin as Chairman and James as Vice-Chairman of the Section IV subcommittee. One topic at the Chicago dinner was the possibility of requesting from ASME advice on whether a low-water fuel cut-off could meet ASME standards if it included a time-delay. (PX 16a, pp. 787-92; PX 18A, pp. 382-88; PX 14, p. 133). After the Chicago meeting, James and Hardin discussed the wording of the request. (PX 16a, pp. 877, *et seq.*)

On April 12, 1971, Mitchell of M&M sent a letter, drafted by James, to W. B. Hoyt, staff Secretary of the B-PV Committee. This letter requested an interpretation of ¶ HG-605 of the B-PV Code. The B-PV Code requires that a glass gauge be placed on heating boilers so that the amount of water in the boiler can be visually determined. (AX V. 8-9 (¶ HG-60(b))). Further, ¶ HG-605(a) requires that a cut-off be located so that the fuel supply automatically will cut off when the surface of the water falls to the lowest visible part of the gauge glass. (AX V. 2 ¶ HG-605(a))).

The April 12, 1971 letter (AX V. 1) inquired whether ¶ HG-605 permitted the incorporation of a time-delay feature in a cut-off if it would operate only "after the boiler water level reaches some point below the visible range of the gauge glass?" Following standard procedures, Hoyt, who had no expertise concerning this aspect of heating boilers, referred the letter to Hardin, as Chairman of the appropriate Subcommittee. (J.A. 864-65, 903-04). Hardin prepared a draft reply, which he sent to Hoyt and the Chairman and Vice-Chairman of the B-PV Committee. (AX V. 6-7).

On April 29, 1971, Hoyt responded to the M&M inquiry by forwarding the "advice" of the Subcommittee Chairman, adopting Hardin's language as an "unofficial communication" (A-7; 635 F.2d at 122). The reply (AX V. 10), in essence, stated that "it is the intent of Par. HG 605(a) that the low-water fuel cut-off operate immediately and positively when the water boiler level falls to the lowest visible part of the water gauge glass," and that a time delay feature which operated after the water had left the gauge glass would provide "no positive assurance that the boiler water level would not fall to a dangerous point during the time delay."

Despite the narrow focus of the April 29 letter, which related only to a time-delay feature that did not begin to operate until water left the gauge glass, officials of M&M misused it in promotional efforts directed at Hydrolevel. In a booklet for its salesmen called "The Opposition—Who They Are, How to Beat Them," M&M included an erroneous statement that "a time delay of any kind in the firing device circuitry would very definitely be against the ASME Code. . . ." (AX V. 11-20). In addition, M&M officials made similar statements to potential customers to persuade them

not to buy the Hydrolevel device. (*See, e.g.*, PX 13, pp. 139-43). ASME at no time participated in this activity; nor was it aware of the misuse of its letter until Hydrolevel brought the matter to its attention in early 1972.

In January 1972, a vice-president of Hydrolevel learned that potential customers had been told about ASME's April 29 letter, and then wrote to Hoyt of ASME requesting a copy of the letter. (J.A. 186-87; AX V. 21). On February 8, 1972, ASME responded, quoting in full the substantive provisions of the April 29 letter. (AX V. 22). On March 23, 1972, the president of Hydrolevel sent a long complaint to Mr. Hoyt and all B-PV Committee and Section IV Subcommittee members requesting that ASME issue a "correcting statement." (AX V. 29-37).

When Hydrolevel's complaint was received, ASME included the matter on the agenda for the next meeting of the Section IV Subcommittee and the B-PV Committee. Hydrolevel was informed of these meetings, and, despite the fact that all ASME meetings are open to nonmembers and to the public, did not send a representative. After discussion in both the Subcommittee and the B-PV Committee, the B-PV Committee drafted a letter specifically informing Hydrolevel that "there is no intent in Section IV to prohibit the use of low water fuel cut-offs having time delays. . . ." The draft was later circulated with the minutes of the Committee meeting to over 300 individuals active in the boiler market (J.A. 673, 837), and was sent out in final form on June 9, 1972. (AX V. 77). Hydrolevel, which could have appealed the June 9, 1972 response to ASME's Policy Board on Codes and Standards had it been dissatisfied with either the contents or the procedures leading to its issuance (App. 818-19), distributed the June 9 letter to customers and potential customers. (J.A. 294; AX V. 78-79).

On August 19, 1975, Hydrolevel filed this suit in the U.S. District Court for the Eastern District of New York. Named along with ASME as defendants were the International Telephone and Telegraph Corporation ("ITT") and Hartford. ITT had purchased M&M in December 1971, and Hartford, according to Hydrolevel, had participated in the conspiracy through the acts of Hardin. Prior to trial, ITT and Hartford settled the charges against them for $725,000 and $75,000, respectively, and an amended complaint was filed naming ASME as the sole defendant.

The amended complaint against ASME originally contained several counts based on state law charges and those counts were voluntarily withdrawn before trial. That left a remaining count charging that ASME conspired with M&M and Hartford to restrain trade in violation of Section 1 of the Sherman Act and to monopolize the low-water cut-off market in violation of Section 2. (J.A. 62-65). The apparent theory of the complaint was that through issuance and misuse of the April 29, 1971 letter, ASME conspired with M&M and Hartford to eliminate Hydrolevel as a potential force in the cut-off market.

At trial, Hydrolevel's theory was that James and Hardin devised and posed a "loaded" question to ASME, and then arranged for an intentionally misleading response by ASME contained in the April 29, 1971 letter and that ASME participated in and was liable for these acts. At the close of the plaintiff's case, the trial judge rejected this hypothesis, ruling that there was insufficient evidence to show that ASME had knowledge of or was liable for the issuance of the April 29 letter. (J.A. 593-94). Instead, the Court allowed the case to proceed on a previously unarticulated theory that ASME might be liable for M&M's

activities because it failed to take more effective steps when it first learned of them in 1972. (J.A. 594).

With respect to the liability of ASME for conspiracy, the District Court charged the jury that in order to find ASME responsible for the acts of its representatives, they had to find that ASME ratified the acts of its agents or that the agents acted to advance ASME's interests. 635 F.2d at 124-25. The lower court rejected plaintiff's proposed charge to the effect that "ASME would be responsible for its agents' actions if they acted within the scope of their apparent authority, even if they did not intend to benefit ASME." On the instruction given, the jury returned a verdict for Hydrolevel. 635 F.2d at 124.

On appeal to the United States Court of Appeals for the Second Circuit, the parties' arguments focused on whether the evidence would support a verdict for Hydrolevel under either of the theories presented to the jury through the trial judge's instructions. The first of these was whether there was any evidence that ASME intentionally or deliberately participated in a conspiracy to restrain and monopolize trade; the second was whether ASME's conduct in response to disclosure of the misleading use of the letter issued through ASME amounted to ratification by it of the acts on which the conspiracy was based. Without reaching either of the theories advanced by the parties, the Court of Appeals affirmed the jury verdict below holding that "the district court erred in refusing Hydrolevel's requested jury instruction that incorporated an apparent authority theory." 635 F.2d at 125.

In reaching its result, the Second Circuit acknowledged that the "appropriate theory for conventional torts" holds that ASME as a corporation could be liable for the acts of its agents only if the agents acted to advance the cor-

porate principal's interest. The court, however, discarded the established agency rule and held that to sustain ASME's liability for punitive treble damages, Hydrolevel had to prove "only that ASME's agents acted within their apparent authority when participating in the conspiracy; it did not have to demonstrate that they also acted in part to benefit ASME or that ASME later ratified their actions." 635 F.2d at 127.

ASME filed a timely petition for rehearing *en banc* on December 15, 1980, and a petition for a writ of certiorari on April 22, 1981.* This Court granted ASME's petition on June 16, 1981.

Summary of Argument

The Second Circuit has enunciated a new rule and policy that professional societies may be held liable to respond in treble damages under the Sherman Act for the acts of their volunteer members within their apparent authority, even if the agents acted to benefit only themselves and not the society principal's interests. A long line of authority in this Court and elsewhere permits corporate vicarious liability under the Sherman Act only when an agent acts in the ordinary course of business to advance the principal's interests or when the principal ratifies the agent's conduct. The Court of Appeals' unreasoned and misguided interpretation of the Sherman Act places professional societies at risk of strict antitrust liability based on a showing of mere unintentional participation in asserted unlawful conduct and strikes at the foundation of such societies' system of voluntary participation in useful technical, publication and educational programs. The over-

* Hydrolevel also filed a cross-petition for a writ of certiorari on damage issues in its case the same day.

reaching new rule thus seriously threatens to curtail many of these beneficial activities.

For decades, the IEEE and other professional societies have, through dedicated volunteer efforts, issued and interpreted industrial and engineering standards, published and disseminated technical information, and fostered continuing technical and professional education in the public interest. They have done so through volunteer efforts structured in such a way as to recognize professional creativity, ingenuity and diversity, while, at the same time, providing a framework of procedural controls for institutional review to foster effective management and to aid in compliance with law, including the antitrust laws. This system of voluntary participation, guided by flexible controls reflective of the diverse character of professional societies and their members, has resulted in valuable technical advancement, greater industrial competence and achievements and greater societal understanding of the use and value of engineering knowledge and technology.

The Second Circuit's unfounded rule of strict accountability under the Sherman Act conflicts both with the philosophy of voluntary participation in professional society programs and with the realities of day-to-day functioning of such societies. Its imposition may needlessly and substantially undercut the willingness of societies and their members to devote time to professional society activities and to continue to explore new areas of technical and professional endeavor because the attendant antitrust risks of participation will be heightened greatly and because these risks cannot be sufficiently minimized by imposing more review and controls without choking the system of voluntary participation. Indeed, a rule of strict liability may herald the curtailment of beneficial professional society programs in any case where organizational

procedures theoretically may be abused by volunteer members for individual commercial advantage. In a large society such as IEEE, a significant number of such programs may be jeopardized, in spite of the existence of reasonable, workable procedural controls because of the impossibility of policing all society members' conduct.

The long established agency rule, on the other hand, is the appropriate one, for it embodies the flexibility and fairness necessary to make it workable. As a practical matter, a society's liability under that rule depends upon a showing that it ratified unlawful acts of agents not carried out for the society's benefit. The requirement thus provides a society with a fair opportunity to properly disassociate itself from the wrongful acts of disloyal members, which, in turn, allows a society to continue to sponsor useful programs without fear of their curtailment due to the imposition of strict antitrust liability.

Accordingly, the Second Circuit's ill-conceived, overbroad rule of strict antitrust liability for professional societies, which lacks any demonstrable legal or practical foundations, should, at a minimum, be overturned and the case remanded to the Second Circuit for a determination of the issue of liability consistent with the proper legal standard.

ARGUMENT

The Second Circuit's Overbroad And Unreasoned Ruling Imposing Strict Antitrust Liability on the ASME Should Be Reversed Because It May Substantially Impair Beneficial Voluntary Technical, Publication and Educational Activities of Professional Societies Against the Public Interest.

A. *The Court of Appeals Applied An Erroneous Standard of Agency Liability Under the Sherman Act.*

The Court of Appeals, in rejecting the District Court's instruction on agency liability, cast aside an undeviating line of decisions in this Court and the lower federal courts which holds that the acts of an agent may be chargeable to his corporate principal under the Sherman Act only when the agent's conduct is both within the scope of his employment authority and is devoted to advancing the principal's interest. *Coronado Coal Co.* v. *United Mine Workers*, 268 U.S. 295, 304 (1925); *United States* v. *Cadillac Overall Supply Co.*, 568 F.2d 1078, 1090 (5th Cir.), *cert. denied*, 437 U.S. 903 (1978); *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1006 n.4 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204-05 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *Truck Drivers' Local No. 421* v. *United States*, 128 F.2d 227, 235-36 (8th Cir. 1942); *Arthur* v. *Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824, 830 (D. Md. 1937). That such a rule has been applied in cases arising under the Sherman Act is not surprising in light of its widespread application by the courts to other federal statutory claims. *E.g.*, *United States* v. *Demauro*, 581 F.2d 50, 53 (2d Cir. 1978) (applicable to

Bank Secrecy Act*); *United States* v. *Ridglea State Bank*, 357 F.2d 495, 498-500 (5th Cir. 1966) (applicable to False Claims Act); *Steere Tank Lines, Inc.* v. *United States*, 330 F.2d 719, 722-24 (5th Cir. 1964) (applicable to Interstate Commerce Commission regulations); *United States* v. *Carter*, 311 F.2d 934, 942-43 (5th Cir. 1963) (applicable to Taft-Hartley Act); *Standard Oil* v. *United States*, 307 F.2d 120, 128-29 (5th Cir. 1962) (applicable to Connally Hot Oil Act).

Despite the plethora of contrary authority, the Second Circuit Court of Appeals employed a novel approach to agency concepts which has exposed ASME to antitrust treble damages on proof that "ASME's agents acted within their apparent authority when participating in the conspiracy" (635 F.2d at 127) irrespective of whether "they also acted in part to benefit ASME or that ASME later ratified their actions." (*Id.*). The Court's rationale for its new standard was that it would "induce greater care to prevent misconduct by agents occupying especially sensitive or responsible positions that invite reliance. . . ." *Id.* at 125. In overextending the proper rule, however, the Court of Appeals ignored the fact that no evidence existed to demonstrate that ASME's disloyal volunteers acted in any way to benefit ASME in a conspiracy to restrain and monopolize trade under the Sherman Act. Moreover, the Circuit Court explicitly recognized that ASME neither had prior knowledge of the illicit acts nor an intention to participate in them, for it found instead that ASME's participation was "unintentional." *Id.* at 131.

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* Indeed, in setting forth what it termed a "general rule of agency liability" in *Demauro*, the Second Circuit, in contrast to its approach in the decision below, did not differentiate on the basis of the statutory contexts in which asserted legal claims arose, and, in fact, cited in support of the "rule," *inter alia*, United States v. American Radiator & Standard Sanitary Corp., *supra*, which applied the "general rule" to claims under the antitrust laws. 581 F.2d at 53.

By its decision, therefore, the Second Circuit has placed its imprimatur on a unique rule where, in effect, strict antitrust liablity will attach to an unintentional participant in conduct violative of the Sherman Act solely by virtue of the unauthorized acts of a disloyal agent who intended to benefit only himself and whose acts were not ratified by his principal. Such a rule is without precedent in law and without foundation in the record.

B. *The IEEE Has Engaged in Useful Technical, Publication and Educational Programs for the Benefit of Its Members and the Public.*

The Second Circuit's unsound rule and policy of strict accountability for professional societies under the Sherman Act also promise to subject societies' beneficial technical, publication and educational activities to a host of needless and harmful consequences, and its deleterious impact will be experienced directly by IEEE. The Institute, which dates to 1884 with the establishment of the American Institute of Electrical Engineers, is currently the world's largest engineering society. Its objectives are both technical and professional in nature and are intended to promote the theory and practice of electrical and electronics engineering, the allied arts and sciences and engineering disciplines. The IEEE is also committed to enhancing the quality of life for all people through the application of technology in its field of competence and to promoting the understanding of the influence of that technology in the public welfare. As a transnational organization, IEEE serves more than 200,000 members organized geographically into 10 worldwide regions and various local sections and student branches. Primarily through libraries, the IEEE's services also reach some 10,000 nonmember subscribers with its wide variety of publication services.

Among the many technical activities carried out by IEEE is the drafting and promulgation of voluntary standards,* an activity which figured centrally in the antitrust claim against ASME upheld by the Court of Appeals. IEEE has well over a hundred technical committees involved in standards development, comprising 20,000 members covering some 850 standards projects and over 400 published standards. IEEE also provides formal representatives to other standardizing bodies. These standards are used by the industrial world for technical communications, for reproducibility of scientific measurement, for public safety, and for regulation. They provide common ground for communication among those using the standards and help to

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*IEEE standards are documents which set forth:

"(1) Lists of terms, definitions, or symbols, applicable to any field of science or technology within the scope of IEEE; (2) Expositions of scientific methods of measurement or tests of the parameters or performance of any device, apparatus, system or phenomenon associated with the art, science, or technology of any field within the scope of IEEE; (3) Characteristics, performance, and safety requirements associated with devices, equipments, and systems, with engineering installations; or (4) Recommendations reflecting current state-of-the-art in the application of engineering principles to any field of technology within the scope of IEEE." IEEE Standards Manual 1.2 (March 1978).

IEEE standards are "voluntary." The use of that term in this connection means that the choice of standards to be developed is voluntary; that the implementation of the standards developed is voluntary; that the organizations that develop standards are primarily organized to perform other functions and voluntarily develop standards because they have the unique expertise to do so; and that the individuals who work on the development of standards volunteer their time and effort as a public service. Further, the application of these standards is also voluntary so that standards are used because their users have decided that they have merit and meet their requirements. This voluntary system has been responsible for effective utilization of technology at low cost to the public, and had in many ways been responsible for the technological leadership of the United States since the turn of this century.

make possible the safe wiring of public buildings, the safe transmission and distribution of electric power, the licensing of nuclear power stations by the Nuclear Regulatory Commission, the maintenance of safe industrial work places through federal agency regulations, the communication among people through telephone and radio systems, and the economic health and well-being of the peoples of the world through promotion of common international practices. Most significantly, these benefits are achieved essentially through the contributions of dedicated volunteer engineers and scientists working within the organizational structure of IEEE technical societies.

Standards development and interpretation within IEEE are governed by procedures designed to achieve fairness by ensuring, for example, a balance of interests on standards committees, as well as the achievement of overall consensus by requiring, among other things, a high level of voting approval before issuance of a standard. The IEEE also works to adhere to the essentials of due process in handling complaints about standards through various appeals within the IEEE organization.* However, given the number of volunteer participants and the diversity of subject matter covered by its standards, the Institute, within the framework of a flexible, voluntary system, realistically cannot oversee the activities of each standards or technical committee in minute detail.

Standards-making is only one of IEEE's technical activities, and other technical activities of the Institute share similar characteristics. The broad range of technical activities includes acoustics, ocean engineering, vehicular technology, nuclear science, information theory, management and social implications of technology. Each year, through

* The ASME follows substantially similar procedures in developing its own standards.

its technical and regional entities, the IEEE sponsors or co-sponsors 150 major conferences and conventions. Most of these conference meetings publish proceedings and the conference books contain as many as 13,000 papers annually.

Control over technical activities, reflecting the diversified and voluntary nature of IEEE, is exercised, according to the Institute's Constitution and Bylaws, through governing groups of IEEE's thirty-one technical societies and councils, which, in turn, have an infrastructure of hundreds of committees on which thousands of members serve. Most of these committees have their own stationery with the IEEE logo and identification and are capable of acting with a fair degree of autonomy and independence. Moreover, while the technical papers and conference publications at the core of IEEE technical activities are subject to review by peer-reviewers, many deal with controversial issues which may have considerable commercial significance, and not all can be reviewed in minute detail before presentation or publication.

The IEEE's voluntary standards and technical activities are complemented by its publishing and educational programs. The IEEE perceives as one of its most important services to the engineering and scientific communities the dissemination of evaluated technical information to advance knowledge and the state of the art. In its role as publisher, the IEEE publishes some 16,000 technical papers each year accounting for almost fifteen percent of the total world literature in electrical and electronics engineering, which, because of their high quality, have achieved supranational recognition. The feasibility and quality of the publication enterprise depend on the volunteer efforts of some 15,000 members who act as reviewers and another 500 who serve as editors and conference organizers. In this area, as in others, the Institute has imposed reasonable general or-

ganizational and operating controls by virtue of peer review and reviewer selection, but it is not in a position to second-guess the motives or the commercial intentions of all reviewers, some of whom might be regarded as potential professional or commercial competitors of a particular author.

In similar fashion, the Institute's educational programs draw upon volunteer support to further the important engineering and societal goals of maintaining a high level of engineering technology and education in collegiate engineering programs and in post-graduate continuing education. In the field of continuing education, the Institute offers over 170 different short courses on a broad range of engineering topics through the efforts of 600 to 1,000 volunteers. At the undergraduate level, the Institute acts to advance engineering knowledge through participation in the formulation of collegiate curricula. In addition, the Institute, in conjunction with the Accreditation Board for Engineering and Technology, voluntarily accredits engineering programs on the basis that they represent a satisfactory level of engineering education for over 390 separate engineering programs at over 100 colleges and universities. Here again, the Institute relies on general peer review to ensure reasonable control over the activities of volunteer members and to reduce the risk that specific members' personal or commercial interests might be used for individual advantage to the detriment of competing interests.

C. *The Second Circuit's Unwise Rule of Strict Antitrust Liability May Seriously Impede Continuation of the Beneficial Programs of IEEE and Other Professional Societies.*

Retention of the expansive rule endorsed by the Court of Appeals seriously threatens to affect the useful standards, technical, publication and educational activities of the Institute and other similar societies by undermining

the voluntary participation of society members and by exposing members and society organizations to much greater and unwarranted antitrust risks through the imposition of strict antitrust liability. This result is clearly counter to the recognition that professional societies perform valuable functions for their members and society as a whole. This Court acknowledged over a half-century ago that trade and professional societies have undertaken a wide range of programs "which are admittedly beneficial to the industry and to consumers. . . ." *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U.S. 536, 566 (1925). Without the consistent support and devotion of time of its volunteer members, IEEE's standards, technical, publication and educational programs could not continue in their present form. Nor would such beneficial programs be absorbed by government for its resources are likewise limited. In short, the unwise policy of the Court of Appeals' new rule is not in the public interest and it will in all likelihood be practically unworkable.

In the standards-making area, budgetary and organizational constraints simply will not permit the kind of pervasive supervision of IEEE's preexisting consensus system, designed to balance interests and establish fair standards, that the Court of Appeals' rule seems to require in order to minimize the risk of antitrust liability. As a result, the Institute's contributions in this area might be seriously diminished. Moreover, the *in terrorem* effect of the Second Circuit's rule may well bear on the willingness of members or their employers to participate in IEEE standards programs.

Further, the impact of the new rule of strict accountability, with its enfeeblement of the voluntary participatory system that is the hallmark of the activities of the IEEE and other professional societies, will spill over into the

technical, publication and educational activities of the Institute with the same harmful consequences. In each of these areas, the Institute has hundreds, in some cases thousands, of volunteer members working to advance the interests both of the engineering profession and of society as a whole by expanding the knowledge and quality of engineering services and technology. IEEE has taken reasonable steps to reduce or eliminate risks that its procedures might be misused to allow a particular, selfish competitive interest to win out at others' expense.

Notwithstanding these efforts, the Court of Appeals' rule superimposes the impractical and unfair requirement that IEEE and other societies are to be subject to the heightened risk of strict liability for less than intentional wrongdoing. In contrast, the established and proper standard of agency liability, which conditions the liability of the corporate society principal on proof of ratification of unlawful conduct where the agent's acts were not taken to benefit the principal, does not work the harm the Second Circuit's rule clearly does. Under that traditional rule, the requirement of proof of a society's ratification of illegal conduct, while necessarily a matter to be resolved on a case-by-case basis, realistically provides the society with a prior opportunity to separate itself in an appropriate way from the wrongful conduct of errant members. The existence of the ratification requirement, and particularly the reasonable opportunity it presents to avoid corporate antitrust violations, represent a flexible and fair accommodation of the interests of law and professional societies which may promote the continuation of beneficial society programs. The Court of Appeals' unfair and overbroad rule, however, has no such elements of flexibility and fairness, and it should not be allowed to stand by this Court.

CONCLUSION

For the foregoing reasons, IEEE respectfully prays that, at a minimum, the judgment of the Second Circuit Court of Appeals be reversed and the case remanded for a determination of the issue of liability consistent with the proper legal standard.

Respectfully submitted,

ROBERT J. SIVERD
Attorney for
The Institute of Electrical and Electronics Engineers, Inc.
30 Rockefeller Plaza
New York, New York 10112
(212) 489-4100

Of Counsel:

DONOVAN LEISURE NEWTON & IRVINE
30 Rockefeller Plaza
New York, New York 10112

Dated: July 30, 1981

APPENDIX

Statutes Involved

Sherman Act, Sections 1-2
15 U.S.C. §§ 1-2

§ 1. *Trusts, etc., in restraint of trade illegal; penalty*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. *Monopolizing trade a felony; penalty*

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade of commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

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NO. 80-1765

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1980

AMERICAN SOCIETY OF MECHANICAL ENGINEERS,
PETITIONER
V.
HYDROLEVEL CORPORATION,
RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF
AND
BRIEF OF AMICUS CURIAE,
THE LEGAL FOUNDATION OF AMERICA

* *

DAVID CRUMP
LAW SCHOOL
UNIVERSITY OF HOUSTON
HOUSTON, TEXAS 77004
(713) 749-3878
ATTORNEY OF RECORD FOR AMICUS CURIAE

SUSAN E. WAITE
THE LEGAL FOUNDATION OF AMERICA
2411 TIMES BLVD., SUITE 24
HOUSTON, TEXAS 77005
(713) 528-3160

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NO. 80-1765

AMERICAN SOCIETY OF MECHANICAL ENGINEERS,
Petitioner
V.
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Respondent

on writ of certiorari to the United States
Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Legal Foundation of America moves for leave to file the annexed brief as amicus curiae, and would respectfully show this Court as follows:

1. Interest of Amicus Curiae: The Legal Foundation of America is a nonprofit, tax-exempt corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve economic freedom, to remove unnecessary regulation, and to protect the principle of limited government. During the present year, LFA has supported the market system and opposed unreasonable regulation in such diverse industries as commercial lending, uranium mining, broadcasting, health care and natural gas production. In this endeavor, it has appeared in this Supreme Court, in the courts of appeals, in United States district courts and in State courts. All litigation undertaken by LFA is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants and contributions from individuals, foundations and corporations.

2. Amicus' Use of Volunteers: The positions taken by LFA are sometimes inconsistent with the economic interests of businesses seeking government intervention and have occasionally subjected it to criticism by those it has opposed. The reasoning of the Court of Appeals in the case at bar, which creates a kind

of strict liability under the antitrust laws for the conduct of volunteers, could be used against LFA by such opponents. LFA relies heavily upon the services of volunteers who have other regular employments. It has been donated the services of partners and associates in firms among the nation's largest, as well as solo practitioners, law professors, and attorneys in government service. Like petitioner ASME in this case, LFA has no reasonable means of assuring that an isolated action taken by one among many pro bono litigators purportedly on its behalf is not undertaken falsely, fraudulently or without authorization, to further the interests of an employer of a volunteer rather than LFA. The deep intrusions it would need to make into the private business of every volunteer's employer, in order to do so, would be unreasonable for LFA, the volunteer and the employer alike.

3. Desirability of an Amicus Curiae Brief: An amicus curiae brief is desirable here because the opinion of the Court of Appeals is a novel interpretation of the antitrust laws that depends upon analogies to other, unrelated claims such as trade libel. Amicus curiae believes, and would show this Court, that the analogies are strained. The law of trade libel, for example, is carefully limited to avoid precisely the result reached by the Court of Appeals, because much of the history of its development concerns the protection of a free flow of information about products. The failure of the Court of Appeals to provide "breathing space" for such communications is so pronounced that it not only misconstrues the antitrust laws, but impinges upon speech protected by the first amendment as well. Furthermore, amicus curiae would show that the Court of Appeals' opinion will have its greatest adverse impact upon precisely those professions that set meaningful, high standards for their members. As a result, it will create necessity for a greater role of government in setting standards for industries and professions, and government in that role is likely to retard new product development far more substantially than the voluntary industry standards that are the subject of this action.

4. Coverage of this Brief: LFA has examined the briefing that occurred in the Court below. This brief does not duplicate the

careful and detailed case law arguments that it may be expected petitioner ASME will make. Instead, it concentrates on issues of economics, public policy and history relevant to the application of the antitrust laws, which, it is believed, will not be argued elsewhere as they are argued here.

For these reasons, the Legal Foundation of America requests that its motion for leave to file the annexed brief be granted.

Respectfully submitted,

David Crump
Professor of Law
Law School
University of Houston
Houston, Texas 77004
(713) 749-3878
Attorney of Record for Amicus Curiae

Susan E. Waite
The Legal Foundation of America
2411 Times Blvd., Suite 24
Houston, Texas 77005
(713) 528-3160

NO. 80-1765

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BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

INTEREST OF AMICUS CURIAE

Amicus curiae adopts the statements in paragraphs 1 and 2 of the Motion for Leave to File Amicus Curiae Brief preceding this brief, as showing the interest of amicus curiae.

STATEMENT OF THE CASE

A. The ASME Communications Allegedly Constituting Participation in a "Conspiracy" to "Restrain Trade"

Officers of McDonnell & Miller, Inc. ("M&M") sent an inquiry to the American Society of Mechanical Engineers ("ASME"), requesting interpretation of its Boiler and Pressure Vessel ("BPV") Code. This was one of 20,000 to 30,000 such inquiries to which ASME responds annually, without charge. In accordance with ASME's procedures manual for its BPV Committee, a full-time ASME officer named Hoyt obtained information necessary to answer the inquiry from the chair of the heating subcommittee, one Hardin. Hardin's actual employment was as vice president of a boiler insurance company, Hartford Steam ("Hartford"). He was one of more than 10,000 volunteers who function annually as

members of ASME committees without compensation. He had counselled M&M in the drafting of the letter, although he did not sign it and did not disclose his participation.* Hoyt, the full-time ASME employee, used the information thus provided by Hardin, the subcommittee chair, to respond to the M&M inquiry.

The inquiry and the response both concerned the application of one section of ASME's more than 400 codes and standards—the 18,000-page BPV Code—to low water boiler fuel cutoffs. Such devices prevent unduly low water levels, which can result in "dry firing" and boiler explosions. The inquiry letter asked whether a time-delay, allowing water to fall below visible range, would comply with a Code section that required an "automatic cutoff" before the lowest visible portion was reached in the gauge glass.

The ASME response to this inquiry furnished by Hoyt began, as interpretation of a code or standard should, with an analysis of the purpose of the BPV Code language at issue. It pointed out that the automatic cutoff requirement called for a "safety feature" rather than an "operating control." Hence it should provide an assurance of safety. Thus the Hoyt letter made the common-sense and factually accurate response, under the circumstances given in the inquiry, that "there would be no positive assurance that the boiler water would not fall to a dangerous point during a time-delay period." Since ASME policy prohibits comment on specific products, the letter was in general terms. It did not state that any particular time-delay, properly used, would necessarily violate the Code; it responded to the inquiry, which specifically concerned a time-delay that would allow water to fall below the visible range.

Upon receipt of this communication, M&M used it in marketing its cutoff, falsely claiming that the Hoyt letter meant that a time-delay, as such, would "very definitely be against the

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* It was not, however, inappropriate for committee or subcommittee chairpersons to give advice concerning the manner of wording inquiries so as to facilitate meaningful responses.

ASME Code." Hydrolevel, which manufactured a competing device containing a time delay, complained to ASME of this sales technique, which was a misuse by M&M of both the BPV Code and the interpretive letter. In response to Hydrolevel's complaint, ASME promptly placed the matter on its agenda. After the next meeting of the BPV Committee, ASME issued a new communication expressly countering M&M's misstatement and flatly asserting that the Code was not intended "to prohibit the use . . . of time delays." ASME circulated this new statement to more than 300 individuals active in the boiler market and, in addition, sent an "official communication" confirming the new statement to Hydrolevel. ASME's BPV Committee followed this course even though Hydrolevel had failed, in response to notice, to have a representative present at the meeting. A Hydrolevel officer stated that the new statement removed any adverse implications as to time delays, and the Court of Appeals held that it removed even the possibility of subsequent harm to Hydrolevel from the interpretation by ASME.

B. The Antitrust Litigation

This series of events formed the basis of a suit by Hydrolevel against M&M (and ITT, which acquired it), as well as Hartford and ASME. The claims initially included various state law theories, such as trade libel, New York's Donnelly Act and others. A claim under the Sherman Act was also asserted. The gist of this latter claim was that a contract, combination or conspiracy in restraint of trade had been engaged in by M&M and Hartford, through the vehicle of ASME, and that it had caused Hydrolevel's business to decline. Before trial, Hydrolevel settled with ITT (for $ 725,000) and Hartford (for $ 75,000). Having thus ended its case against the two defendants who were "far more culpable" (in the words of the Court of Appeals) for these relatively small sums, Hydrolevel had a war chest with which to proceed to trial, with the hope that if it could prove liability against the most marginal defendant, ASME, it could recover very large damages.

Also before trial, Hydrolevel voluntarily abandoned the asser-

tion of any state law claims against ASME. It appears those claims would not have fit any conduct of ASME, even arguably. For example, ASME could not have been convicted of trade libel because it uttered no false statements, made statements only of opinion and not of fact, and made no statements concerning Hydrolevel's product.

At the conclusion of the evidence, the trial judge instructed the jury that unlawful acts of an agent could be attributed to a corporate entity only if they were within the scope of authority given by, and performed "in behalf of," the corporation. He further instructed the jury that ASME could be liable only if (1) its agents had acted to further its interests or (2) it had ratified the allegedly offending acts. This instruction should have led to a verdict against liability, since no evidence supported such a finding. The jury, however, found against ASME.* It was, indeed, a runaway jury; it assessed damages of $ 3.3 million, an amount so disproportionate to any supporting proof that the Court of Appeals remanded for a new trial.

C. The Court of Appeals' Holding on Liability: "Apparent Authority" and Reinterpretation of ASME's Interpretation

The Court of Appeals, however, affirmed the liability holding on a theory not briefed by the parties. It held that apparent authority of persons purporting to act for ASME was sufficient. Furthermore, it held that the evidence showed apparent authority on the part of the relevant persons (apparently, as a matter of law, since the jury did not pass on this issue). The Court of Appeals labelled its holding "stringent," but stated that such a holding was justified to make ASME act with greater care in all its transactions with volunteers. The Court reasoned that ASME must develop "review procedures" sufficient to prevent its inter-

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* As ASME pointed out in the Court of Appeals, it is clear that emotional jury argument and improperly admitted evidence contributed to this result.

pretations from being misused to do injury to a competitor by the activities of any of its more than 90,000 members or 10,000 volunteers.

The Court of Appeals reached this result, in part, by reinterpreting the ASME Code in a manner contrary to ASME's own interpretation. The conclusion that a time delay would "prevent positive assurance" of timely cutoff, said the Court, did not "follow from" the paragraph of the interpretive letter immediately preceding it. However, the issue that Hoyt was called upon to address was not whether this particular sentence "followed from" anything in the preceding paragraph, but how the inquiry should be answered in light of the ASME Code. The inquiry asked about a time delay after the water had reached the bottom of the gauge glass. Furthermore, the Court of Appeals failed to recognize that a time delay, even if the cutoff is activated at a point above the gauge glass, functions precisely because it "cuts off the cutoff"—it simply removes the safety device. It interposes between the cutoff and the boiler an additional mechanism subject to malfunction, and it may be subject to variations in the length of time delay. Since no particular time delay was specified, and the answer was couched in general terms proceeding from the safety purposes of the Code, it is submitted that the Court of Appeals' apparent holding—that the ASME interpretive letter was logically indefensible—was itself the product of a logical error.*

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* Furthermore, it involved the Court in a determination not authorized by anything in the Constitution or jurisdictional statutes.

Hydrolevel induced this holding by characterizing its device, during the appeal, as "fail-safe." Given the number of ways in which a malfunction can occur, this is a dangerous view of a safety device. Hydrolevel apparently made the assertion because its "probe" was primarily electronic rather than mechanical and depended upon the breaking of a circuit. The reasoning that it was thus rendered fail-safe is tantamount to the assertion that an elevator call button, a television set

SUMMARY OF ARGUMENT

Amicus curiae will not duplicate the case-law arguments expected to be made by counsel for ASME. Instead, this brief attempts to add economic and policy arguments.

I.

The strict liability approach inherent in the Court of Appeals "apparent authority" reasoning would punish those professional associations that set meaningful standards and reward those that adopt standards convenient to their members. Such a result would not amount to removal of a "restraint of trade."

II.

At the same time, the failure of professional self-regulation induced by this holding would create a corresponding need for greater government activity in the professions. This role of government would result in a compulsory rather than voluntary compliance system, loss of economic efficiency, diversion of taxpayer funds from other needs, and, ironically, a greater impediment to new product introduction than any professional association's voluntary standards would be likely to impose.

III.

ASME has been held liable here for the issuance of communications that are protected speech under the first amendment. The Court of Appeals' admittedly "stringent" approach to the case is inconsistent with the doctrine that communications should be afforded "breathing space" that provides protection even for mistaken or erroneous statements. The Court of Appeals' analogy to such claims as "injurious falsehood" or trade

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or a burglar alarm is fail-safe. In any event, Hydrolevel's claim in this regard has no effect on the validity of ASME's interpretive letter, which was written about time delays in the abstract and not about Hydrolevel's product in particular.

libel was particularly inappropriate, because this tort has been carefully developed in a manner that protects speech. Finally, the Court of Appeals' opinion is inconsistent with the associational interests of volunteers in professional societies, since it would require procedures consitituting a deep intrusion into their employers' business and would induce reliance on orthodoxy and homogeneity rather than diversity.

ARGUMENT AND AUTHORITIES

I. THE COURT OF APPEALS' HOLDING WOULD PENALIZE PROFESSIONS THAT ATTEMPT TO SET HIGH STANDARDS.

A. An Antitrust Lawyer Would Likely Advise a Professional Association to Avoid the Setting of Meaningful Standards Because of the Court of Appeals' Decision.

Any antitrust lawyer worth his salt would advise a professional association to limit the setting of standards after the opinion of the Court of Appeals in this case. If this prediction seems unduly pessimistic, it should be pointed out that written examples of precisely such advice, resulting from similar decisions, are to be found. See, e.g., Millstein & Buc, Supreme Court Ruling Adds Fuel to Debate over Health Planning, NATIONAL L.J., July 13, 1981, at 26. Millstein and Buc advise health care insurers to "limit their implementation" of the National Health Planning and Resources Development Act of 1974. Their reason for suggesting this frustration of the intent of Congress is that insurers must do so to "minimize their antitrust exposure" in response to a recent decision of this Court. Id. at 29.

The "limiting of implementation" that would be caused by the Court of Appeals' opinion in this case would be even more pronounced, and it would affect precisely the most useful sort of professional self-regulation. To be meaningful, a standard must result in a curtailment of the business practices of at least some

in the profession. A standard that the lowest common denominator already meets would hardly be worth adopting. But if a professional or a businessman is affected adversely by a standard, human nature will lead him, rightly or wrongly, to view it as Hydrolevel viewed the interpretive letter here—that is, as inappropriate. Since such a standard is by definition promulgated by a group of other professionals, the situation provides a natural basis for the claim that it is the result of a "contract, combination or conspiracy" of his competitors to "restrain trade" by limiting his business activity. The additional litigation that would thus face a professional association adopting meaningful standards amounts to a powerful deterrent even if one assumes the association can prevail in all such suits, because of the expense of defense.

An antitrust lawyer would counsel an association such as ASME that it could avoid this added litigation in several ways.— First, it could curtail the promulgation of codes. (Few professions have promulgated these in numbers approaching ASME's, in any event.) Secondly, it could decrease the issuance of Code interpretations, leaving the public to read the Code as best it can. (Interpretations are particularly likely to create claims of the type at issue here, because they translate generalities into specifics.) Third, it could ensure that its Code or interpretations are composed of platitudes that do not affect the activities of any business in any meaningful way. ASME's adoption of the Court of Appeals suggestion that it should have "review procedures" that would "guard against" the events in this case in a "stringent" manner could succeed only if it also amounted in some degree to the adoption of one of these three approaches.

B. The Natural Tendency of Professions Is to Set Standards Accomodating the Lowest Common Denominator, and This Tendency Would Be Encouraged by the Court of Appeals' Opinion.

Even without the Court of Appeals' opinion in this case, professions have an inherent tendency to avoid meaningful standards and to prefer codes consisting of pious but unenforceable

homilies. Unless a professional association exercises vigilance and courage, it will unconsciously adopt procedures of a sort that would satisfy the Court of Appeals' suggestion at public expense —procedures designed to ensure that such standards, guidelines, policies, Codes of Professional Responsibility, or other professional norms as result from its convocations do not curtail activities its members desire to engage in, even to protect the public. It can often justify such a failure to regulate itself by reference to high-sounding ideals or other external justifications. The Court of Appeals' opinion would furnish precisely such a justification here.

A desire to protect the traditional prerogatives of attorneys, for example, has led to a Code of Professional Responsibility that has been frequently attacked as insufficient to protect the client. The following excerpt from Burt, Conflict and Trust between Attorney and Client, 69 GEO. L.J. 1015, 1042 (1981), is one recent scholarly statement of the idea:

> . . . The desultory character of current mechanisms for enforcing professional standards of conduct is one powerful indication of the professions' disinclination to probe the attorney-client relationship. Disciplinary proceedings by the organized bar are suspiciously rare occurrences . . . . The statistics suggest . . . that the organized bar turns a collective blind eye to substantial numbers of inappropriate attorney-client transactions.

The statistics bear out this assertion. See Steele & Nimmer, Lawyers, Clients and Self-Regulation, 1976 AM. BAR. FOUND. RESEARCH J. 917, 979 (comparing complaints with bar actions); Martyn, Lawyer Competence and Lawyer Discipline: Beyond the Bar?, 69 GEO. L.J. 705 (1981). Cf. M. Bloom, The Trouble with Lawyers 157-91 (1968). The inability of the legal profession to regulate itself has been described as "endemic." Marks & Cathcart, Discipline within the Legal Profession: Is It Self-Regulation?, 1974 U. ILL. L.F. 193, 196 (1974).

This inability to maintain high minimum standards is a general phenomenon among professions. For another example from a very different profession, see Funeral Industry Guidelines Cri-

ticized, Houston Chronicle, July 8, 1981, sec.1, at 1, col.1 (reporting consumer opposition to Nation Selected Morticians' "package pricing" guidelines as "worse than no rule at all"). The point is not that these professions are particularly "bad" ones. Rather, the point is that against this background, ASME's more than 400 codes and standards represent a real and substantial achievement, overcoming the tendency to protect the profession rather than the public.

Adoption of the very Code section whose interpretation led to the inclusion of ASME in this suit, for example, was preceded by a history of boiler "dry-firing" that resulted in many instances of injury, death and property damage. The evidence shows that since promulgation of the BPV Code, such accidents have been virtually eliminated. An attorney would be hard pressed to point to a single section of his profession's Code that incorporates safety procedures that have eliminated the incidence of any undesirable practice. To the extent that its "stringent" rule curtails promulgation or interpretation of ASME's Codes, the Court of Appeals' reasoning will curtail service that is clearly in the public interest.

C. These Considerations Are Relevant to Determining Whether ASME Should Be Adjudged To Have Participated in a Conspiracy in Restraint of Trade.

This analysis should be viewed as relevant to the question whether a professional association in ASME's situation should be considered to have violated the Sherman Act. The language of that Act—requiring a "contract, combination or conspiracy" in "restraint of trade"—is flexible. It was intended by Congress to permit beneficial business transactions, even if they resulted in some restriction. Its application depends on the nature of the activity and its context. Indeed, the beneficial aspects of professional self-regulation have already been recognized as an important factor in a case such as this:

> It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically apply to the professions antitrust concepts which originated in other areas. The public service aspect and other features of the profession may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.

Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-89 & n.17 (1975); cf. National Gerimendical Hospital v. Blue Cross, 49 U.S.L.W. 4672, 4676 (U.S.S.Ct. June 15, 1981) (cost-containment procedures adopted by health insurance consortium in cooperation with Health Systems Agency may be accorded flexible antitrust rules in order to "make [cost-containment] work"). Significantly, the present case does not involve pricing or other sensitive antitrust problems. Instead, it involves the setting of professional standards, which has been described as a professional associations' most important and appropriate activity. See Symposium, Trade and Professional Association Ethics and Standards, 46 ABA ANTITRUST L.J. 653 (1978).

In the Court below, Hydrolevel attempted to characterize arguments such as these as though they were efforts to claim an antitrust exemption for nonprofit associations. Amicus curiae does not advocate any such thing and does not so understand ASME's argument. If a nonprofit entity such as this amicus curiae should participate intentionally in a scheme to monopolize, fix prices or divide markets, or if ASME were to do so, the nonprofit nature of the entity should obviously not provide a defense. All that is here contended is that the beneficial aspects of the activity that would be curtailed ought to be considered in determining whether the activity should be considered a restraint of trade.

The rule adopted by the Court of Appeals—that apparent authority is sufficient to hold liable a professional society for the actually unauthorized acts of its volunteers— is a species of strict liability. In fact, the very purpose of apparent authority is to make the care taken by the defendant irrelevant and to im-

pose liability based merely upon the result (the external appearance that is created), irrespective of the real intent of the defendant. Professional associations are already an antitrust battleground. They are the frequent target of liability claims that already discourage some beneficial activity. Those claims are perhaps unavoidable, since professional associations are and should be subject to the antitrust laws, and the curtailment of some beneficial activity and the assertion of some unmeritorious claims are the price that must be paid. The strict liability approach of the Court of Appeals, however, would exact a price that would be disproportionate.

II. DISCOURAGEMENT OF PROFESSIONAL SELF-REGULATION WOULD CREATE A CORRESPONDING NEED FOR GOVERNMENT STANDARDS, WHICH UNAVOIDABLY CONSTITUTE A FAR GREATER IMPEDIMENT TO NEW PRODUCT DEVELOPMENT.

To the extent that it discourages appropriate self-regulation, the Court of Appeals' decision will create a corresponding need for government licensing to replace it. Such a scheme of compulsory certification will inevitably and unavoidably be inferior to voluntary compliance with standards recognized in the marketplace. In the first place, a government command system is less desirable than a voluntary one simply because it prevents the personal freedom to buy and sell the particular products one wants. If government rather than ASME had been interpreting the BPV Code here, it would likely have proceeded by flatly barring the sale of the product—even to those who wanted it, such as Brooklyn Union Gas Co. ("BUG"). Secondly, there is the fact that government promulgates regulations using taxpayer funds that are thus diverted from some other need. For example, it cost an almost unbelieveable 8.5 million dollars—more than the trebled damages that were reversed in this case as excessive—for the Department of Energy to promulgate a single set of guidelines designed to make household appliances more

energy-efficient. ASME performs such functions at no charge by harnessing the desire of its members for part-time public service.

In the third place, compulsory regulation lacks economic efficiency. A sufficiently complex regulatory process to take into account all variations in the weighing of costs and benefits that buyers and sellers are likely to exhibit in the real marketplace would be too cumbersome to administer. Seldom does a nonprofessional bureaucracy have the expertise to promulgate accurately targeted regulations in technical fields. Furthermore, an agency capable of duplicating the work of ASME would naturally grow, and would attempt to enlarge its personnel, jurisdiction and budget. Finally, the most ironic aspect of Hydrolevel's claim against ASME is that the delay and expense associated with government standardmaking are far more likely to destroy the marketing of new and useful products. Situations far more serious than Hydrolevel's experience are simply the norm in regulated industries.

One might tend to underestimate the nature of this undesirable effect of government regulation on new product introduction unless one considered examples. The Food and Drug Administration is illustrative. During the week before this brief was printed, in fact, the following report appeared in Newsweek, July 27, 1981, at 63:

> . . . The U.S. Food and Drug Administration banned cyclamates as sugar substitutes in 1969 because of evidence they caused cancer. Only Congressional action has kept the agency from taking saccharin off the market for similar reasons. Last week, after an eight-year controversy, the FDA finally approved the marketing of aspartame, a low-calorie sweetener that the manufacturer says tastes more like sugar than any of the other substitutes.
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> . . .
>
> [G.D.] Searle [& Co., aspartame's manufacturer] had a tortuous time getting the FDA to accept aspartame. The agency initially approved the sweetener in 1974, but rescinded its action the next year when . . . a psychiatrist at Washington University . . . claimed that the substance

caused brain damage in animals . . . .

While Searle embarked on further safety tests, the FDA appointed a "scientific board of inquiry" . . . . The board concluded last year that most of the evidence for neurological damage was unfounded, but suggested that further studies be made to determine whether aspartame caused brain tumors in animals. Exasperated, Searle sued the FDA to force a decision. . . . Final approval came when the FDA's own Bureau of Foods decided that the brain tumor evidence was flimsy at best. "Few compounds have withstood such detailed testing and repeated scrutiny," said FDA commissioner Arthur Hays Jr. "The process . . . should provide the public with additional confidence about its safety."

However, the author of this piece concluded that "The process also provides a good case history of the FDA's extraordinarily elaborate and time-consuming requirements." Id.

The point is not that FDA handled aspartame inappropriately. It was following its governing statute and its usual procedure. Rather, the point is that G.D. Searle's situation illustrates the plight of a manufacurer subject to compulsory standards, even when the administrator of those standards, the FDA, functions as it should. The comparison to Hydrolevel's situation is striking. Hydrolevel's assertion of a miscarriage of justice was addressed completely and promptly by ASME upon Hydrolevel's first complaint, and Hydrolevel, unlike Searle, was never under a compulsion not to market its product. The point, in other words, is that the partial replacement of ASME's function by a federal Administration would not be in the public interest, even though the necessity of such replacement would be created by the Court of Appeals' opinion.

To the extent that the Court of Appeals' decision has the effect of decreasing ASME's activity in setting and interpreting standards that delay or impede marketing of new products, that decision will have the corresponding effect of requiring the substitution of government action to perform precisely the same function with an unavoidably decreased efficiency. The funeral

industry's failure to set meaningful standards has prompted the FTC to promulgate compulsory rules. See Funeral Industry Guidelines Attacked, Houston Chronicle, July 8, 1981, sec.1, at 22, col.1. Failure of the attorney grievance process in Texas has led to legislation empowering the State Supreme Court to take it over. The notorious failure of professional sports to check inappropriate violence has led to calls for the enactment of a statute so vague that it would require detailed regulatory interpretation to be understood. See Sprotzer, Violence in Professional Sports: A Need for Federal Regulation, 86 Case & Comment 3 (1981); Sports Violence Act of 1980, H.R. 7903, 96th Cong., 2d Sess. (1980). There can be little question that failure of a profession to promulgate standards in areas involving such serious questions of public safety as do ASME's codes would create a vacuum that the government would fill simply out of necessity. When standards in these matters are lacking or inadequate, the potential consequences are illustrated by such events as the recent structural collapse of hotel walkways at the Hyatt Regency in Kansas City, which occurred during the preparation of this brief. See Hotel Toll Hits 111 in Kansas City, Houston Chronicle, July 19, 1981, sec.1, at 1, col.1. There can be little question that any decrease in ASME's activity will either create similar accidents or, more likely, induce governmentally set and supervised standards.

A further irony is that the misuse of the resulting regulatory system of government as a means of stifling competition would be immune from liability under the antitrust laws. Thus if ITT and Hartford Steam were to elicit government standards that had the effect of excluding Hydrolevel from competition, there would be no claim upon which relief could be granted—not only not against the government, but not against ITT or Hartford either. See Parker v. Brown, 317 U.S. 341 (1943); cf. National Gerimedical Hospital v. Blue Cross, supra. This immunity would exist even if the competitors conspired with government agents openly, intentionally, maliciously and for the express purpose of monopolizing the trade. As the present case indicates, standards imposed through a professional association do not carry immunity for those who use them intentionally to restrain trade; ITT

and Hartford recognized the possibility that their intentional conduct might constitute an antitrust violation. In addition, antitrust laws provide a check against intentional participation by a professional association itself. However, the "apparent authority" reasoning of the Court of Appeals, with its attendant strict liability standard, would so discourage professional self-regulation as to necessitate government action that would ironically create an ipso facto exemption from the very laws against restraints of trade that are asserted here.

III. THE COURT OF APPEALS' OPINION ENCROACHES UPON SPEECH AND ASSOCIATION PROTECTED BY THE CONSTITUTION.

A. The Strict Liability Standard Imposed by the Court of Appeals Is Inappropriate in an Area Involving Communication of Information, which Should Be Afforded "Breathing Space"

In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), a newspaper had been held liable under State libel laws for printing false information contained in an advertisement furnished it by a source acting to further its own motives. This Court, while recognizing that a State had a valid interest in its libel laws, held that the first amendment to the Constitution barred such a claim in the absence of "actual malice" actually attributable to the newspaper. Robust, wide-open debate would be inhibited by any other rule, since timely speech required "breathing space." The holding of the Court of Appeals, which is cast not in the terminology of breathing space but rather in the rhetoric of strict liability, is an inappropriate approach to the case.

This case involves speech. The "tort" of which ASME here has been convicted in the lower courts consists entirely of the dissemination of information. There is no question the speech here at issue is of a protected kind. In the first place, commercial speech designed solely to promote the ends of the speaker is protected. E.g., Bates v. Arizona State Bar, 97 S. Ct. 2691

(1977). In the second place, the speech here at issue, which is disseminated to the public for general purpose use without expectation of economic benefit to ASME, is a higher level of speech than commercial advertising, as is a newspaper.

Although the antitrust laws serve important societal purposes, they do not occupy a higher Constitutional status than libel laws. They are, like the libel laws, limited by the first amendment. There can be no question that the crushing burden of liability imposed in this case constitutes as real a deterrent to the protected speech in which ASME engages as the application of strict liability for libel against the New York Times would to news reporting. The Court of Appeals viewed it so; it reasoned that its holding would make persons in ASME's situation exercise "greater care" before they engaged in communications.

Hydrolevel's argument, in essence, is that the state of mind and motives of Hardin should be attributed to ASME, in that he provided the information by which Hoyt answered M&M's inquiry. To do so would be similar to attributing the motives of a source to a newspaper editor in a strict liability context. Newspapers are constantly faced with the problem of dealing with volunteer sources that have motives to falsify. They may work with, and present to the public by direct quotation, many sources with whom they deal on a regular basis and in a close and cordial manner. Statements of a mayor of a City about one of his political rivals, or by the manager of a professional baseball team about a players' strike, are examples. It is to be taken for granted that such sources will attempt to use the newspaper for their own purposes. But to hold the New York Times liable for the printing of even a provably false quote from such a source—or for that matter, for printing something written by an advertiser whom the paper holds out as authorized to use its pages explicitly for the advertiser's own purposes—would create a deterrent to communication. So would the opinion of the Court of Appeals here.

Even if the first amendment is itself not applicable here, these concerns are important to determining whether ASME's actions made it a participant in a contract, combination or conspiracy "in restraint of trade." A construction of the antitrust laws that

would discourage the dissemination of information that is itself necessary to trade would not appear to follow the intent of Congress. The decisions interpreting the antitrust laws have, in fact, so held. "[I]n the absence of bad purpose, mistakes made in the formulation or maintenance of standards do not subject one to . . . antitrust liability." Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n, 261 F. Supp. 154, 159 (D. Ore. 1966), aff'd, 399 F.2d 155 (9th Cir. 1968). As this Supreme Court has stated:

> . . . the Sherman law neither repeals economic laws nor prohibits the gathering and dissemination of information. Sellers of any commodity . . . would hardly be deemed to be conspirators engaged in the restraint of interstate commerce . . . . merely because they became stockholders in a corporation, or joint owners of a trade journal, engaged in the compiling of reports.

Maple Flooring Mf'rs Ass'n v. United States, 268 U.S. 563 (1925). The Court held, there, that even an effect of "stabilizing prices," absent a motive to engage in price fixing, did not render the communications at issue a violation of the antitrust laws.

B. The Court of Appeals' Reinterpretation of ASME's BPV Code, and Its Foundation of Liability upon Disagreement with ASME's Own Interpretation, Is an Inappropriate Approach to Protected Speech.

The interpretation of formal language such as the BPV Code may require reference to more than its literal words. The intent underlying the language may be relevant, as may the precise circumstances to which it is applied, or changes in technology, or consumer expectations. Situations might even be found in which an interpretation that is superficially at variance with the literal language may be the most appropriate one; such situations arise not infrequently in the law. For these reasons, ASME's interpretation of its own code should not have been used to impose liability upon it even if nominally inconsistent with the Code. However, that was precisely the approach of the Court of Appeals: in essence, it held that a professional association cannot

appoint a spokesperson to interpret standards without potential liability unless "stringent" procedures ensure that a contrary interpretation may not be reached later.

The Court of Appeals actually labelled the letter written by Hoyt as "fraudulent." This conclusion, which was apparently based on the Court of Appeals' conclusion that the letter was inconsistent with the Code, was erroneous. As is shown above (in the Statement of Facts, subsection C), the letter was factually accurate. A time delay functions by interdicting or removing the required automatic cutoff for a period of time and thus violates the requirement of an operative safety device, even if that requirement is read literally. The letter must be read in the context of the inquiry to which it responded; that inquiry expressly assumed a time delay that would operate only after the water was below the visible range on the gauge glass, an arrangement that would clearly violate the literal terms of the Code, as well as its intent. The response, furthermore, was not cast in terms of any specific device. Finally, the statement is factually accurate and consistent with the intent of the Code unless one assumes, as did the Court of Appeals, an additional fact contained in neither the inquiry nor the response: that the cutoff would be activated well in advance of the time the water reached the bottom point. These circumstances do not support the Court of Appeals' conclusion that the letter was "fraudulent." At most, they show that the inquiry could have been answered by a differently worded response, but to so conclude is not to say that the interpretive letter (which after all, was an interpretation) was "wrong" or should subject ASME to liability.

This case is an example of the reason underlying the rule of New York Times v. Sullivan. "[A] great danger of self-censorship arises from the fear of guessing wrong—the fear that the trier of fact, proceeding by formal processes of proof and refutation, will after the event reject the individual's judgment of truth." L. Tribe, American Constitutional Law 634 (1978). The Court of Appeals' opinion would justify that concern, encouraging professions to engage in self-censorship rather than in protected speech on issues of public safety.

C. The Court of Appeals' Comparison of the Communications Here at Issue with the Common-Law Claim for Disparagement, which Is Carefully Limited to Protect Communications, Should Have Led to the Opposite Result.

The Court of Appeals reached its result, in part, by comparing the antitrust laws to other business "torts," including especially the common-law action for "injurious falsehood" (also called disparagement or trade libel). Since the Court concluded that the evidence here showed "essentially a fraud," it considered that the differences between this case and one for injurious falsehood could "hardly be material." Ironically, however, if the claim here were for trade libel, the required elements of proof would clearly foreclose Hydrolevel's recovery.

The law of trade libel has been carefully limited, over the years, to allow breathing space for statements of opinion that harm economic interests, on the theory that the dissemination of precisely such communications is what makes a competitive market competitive. Thus the "injurious falsehood" claim requires proof of malice attributable to the defendant. It also requires clear identification of the plaintiff's product, which is lacking here. It contains various kinds of privileges designed to protect even mistaken statements in the nature of product comparisons. The burden of proving factual falsehood is on the plaintiff, and "mere general statements of comparison" do not suffice. Neither do "statements of opinion," which, presumably, would include an opinion as to the interpretation of a Code. "[T]he tort has never been greatly favored in the law." W. Prosser, Torts 915-926 (1971). It was only natural that Hydrolevel abandoned its state law claims before trial for these reasons, and that it proceeded to trial on a theory that had had few occasions to be tested against limits designed to protect communications.

D. The Court of Appeals' Decision Constitutes an Unwarranted Infringement of the Interest of Vol-

unteers in Associating for the Advancement of Their Professions.

Americans are the most generous people in the world. Monetary charitable contributions annually exceed $ 200 for each man, woman and child in the United States; the world's runner-up is Canada, with a much smaller $ 35 per capita annually. See Extra, July 1981, at 22 (reprinted from The Washington Post). In-kind contributions of volunteer service probably exceed this amount, if ASME's members' performance is any indication. Americans volunteer their professional time because they receive something of inestimable value in exchange: association with others. The Court of Appeals' directive that an association must be more restrictive with its volunteers translates into a suggestion that the association refuse precisely the services of those volunteers who are most skillful, qualified and informed and that it tend to avoid allowing volunteers to deal with matters that are controversial. This aspect of the holding is not only opposed to the interest of the larger public, but also constitutes an unwarranted infringement of the interest of volunteers in associating for the advancement of their profession.

The Court of Appeals' reasoning does not take sufficient account of the nature of associations and the committees that professional associations tend to create. The emphasis should not be on orthodoxy or acceptability of point of view. Instead, persons with varying viewpoints and conflicting interests should be permitted to participate. The sort of "screening process" contemplated by the Court of Appeals' opinion would reduce to an insistence upon homogeneity of those having responsibility. It is submitted that committee members, and for that matter committee chairpersons, should not be selected on such a basis. A professional association should be able to have persons of widely differing views serve as committee chair in sequential years without fearing that it is exposing itself to disparate antitrust liability in the two years.

The Court of Appeals especially criticized the absence of "review procedures." In fact, ASME already has a procedures

manual for its BPV Code that appears to rival the Federal Rules of Civil Procedure for complexity. Hoyt's handling of the M&M inquiry was guided by a choice between sections 8.01 and 8.02 of the Manual; other established procedures allowed the chair to determine whether the inquiry should be answered formally or informally. The Court of Appeals criticized the "unsupervised" nature of this decision. The alternative would be to place the chair in the position of delaying all answers to inquiries until a full committee meeting could consider them in plenary session, an approach that would mean that many inquiries would simply go unanswered. It is not the function of a procedural system to remove all discretion of individuals. Instead, the purpose is to guide discretion. See generally K. Davis, Discretionary Justice (1976). The public perception of unduly complex procedures is that of "red tape," and it is unpleasant either to be in or to deal with the sort of organization in which "no one has the authority to make a decision."

The intrusion into the relationship of volunteers with their employers suggested by the Court of Appeals' reasoning would be especially counterproductive. Should an association prevent all who might have a "conflict of interest" from serving in any policymaking capacity? If so, there might literally be no qualified industry persons who could serve on a committee handling a controversial issue. Should the association investigate the motives of a volunteer? If so, how? Can it safely accept the statements of the volunteer that he is acting in the public interest rather than to serve some narrower interest, or must it contact the volunteer's employer to find out whether he has misrepresented the facts? Learning the potential motives of a volunteer's employer with respect to evolving technology would require extensive investigation into the employer's private business. Indeed, the Court of Appeals does not suggest even that a searching inquiry directed to the employer would be sufficient; the employer too may have undesirable motives and may perpetrate the sort of misuse of trust that was perpetrated upon ASME here.

And once one had learned of a volunteers' motives, it is not at all clear what a professional association should do. If it finds

that his views and his employer's interest happen to coincide, or even that his decisions are likely to further the interests of his employer, should it refuse to allow him to participate? If so, it would disallow participation by most in the population, because it is submitted that such a description would fit most professionals. Perhaps in a situation involving the setting of standards affecting competing products, the association should disallow persons with a potential conflict from participating. But if a duct is indeed defective, the persons most likely to be in a position to make that fact known are likely to be employees of its manufacturer's competitors.

It must be remembered that the situation ASME perceived in this case was that of an ostensibly neutral volunteer (a vice president of a boiler insurer), who provided a facially defensible interpretation, without factual inaccuracy, of one section of a Code of over 18,000 pages, the Code being one of more than 400 and the interpretation being one of 20,000 to 30,000 such interpretations per year. This communication, in a single instance, produced a judgment exceeding by many times the entire annual budget of the association. The only way the probability of such an occurrence could be lessened would be by extensive investigation of each volunteer. "Review procedures" that would prevent it would be expensive and cumbersome. Their adoption would please no one but antitrust attorneys, for whom the instant case is a kind of Professional Association-Lawyer's Relief Act. It is likely that no preceding investigation or subsequent review could have detected the needle in a haystack that constituted this breach of ASME's trust. The value of such procedures is small in comparison to the substantial infringement they would work upon the freedom of sincere volunteers to associate.

Amicus curiae does not contend that Constitutional protection of the freedom of association would, itself, prevent Congress from producing such a result as this, if Congress intended to do so. The decisions of this Court indicate that indirect discouragement of association is not sufficient to render a statute unconstitutional (although the Constitutional pro-

hibition can be invoked by a particularly severe application). E.g., Buckley v. Valeo, 424 U.S. 1 (1976). However, it is submitted that serious associational interests are at stake here, and the argument raises the question whether Congress intended such a drastic result when it prohibited conspiracies in restraint of trade. The view of the Court of Appeals, which would encourage groups such as ASME to curtail thousands of volunteer transactions in order to prevent a single incident, is an unreasonable construction of that language.

CONCLUSION

For the reasons here stated as well as those expected to be set forth in the brief of petitioner ASME, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

David Crump
Professor of Law
University of Houston
Houston, Texas 77004
(713) 749-3878
Attorney for Amicus Curiae

Susan E. Waite
The Legal Foundation of America

CERTIFICATE OF SERVICE

I hereby certify that I have deposited in a United States post office, postage prepaid, three copies of the above motion and brief to counsel for each party, namely: Harold R. Tyler, Jr., Patterson, Belknap, Webb & Tyler, 30 Rockefeller Plaza, N.Y. 10020; and Carl W. Schwartz, Metzger, Shadyac & Schwartz, One Farragut Sq., S., Washington, D.C. 20006.

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No. 80-1765

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,
Petitioner,
v.
HYDROLEVEL CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE NATIONAL COMMISSION FOR HEALTH CERTIFYING AGENCIES

KIM ZEITLIN
950 25th Street, N.W.
Washington, D.C. 20037
(202) 337-3894
Attorney for Amicus Curiae National Commission for Health Certifying Agencies

Of Counsel:
NEIL E. WEISFELD
NATIONAL COMMISSION FOR HEALTH CERTIFYING AGENCIES
1101 30th Street, N.W.
Washington, D.C. 20007
(202) 333-9300

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether an organization of competitors which conducts a process to determine market entry for others has a public duty to safeguard the objectivity of its process.
2. Whether evidence that a standard-setting organization met its duty to safeguard its processes against conflicts of interest is admissible in its defense that it did not engage in an unreasonable restraint of trade and was not an intentional participant in a conspiracy.
3. Whether the law of agency can foreclose a standard-setting organization from introducing this evidence in its defense.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Commission for Health Certifying Agencies, Inc. (National Commission) moves for leave to file the attached brief as amicus curiae.

1. **The amicus curiae has a substantial interest in the outcome of this case.**

The National Commission is a non-profit membership organization which sets standards for competency evaluation programs for health occupations in the United States.[1] These competency evaluation programs, or cer-

[1] The members of the National Commission for Health Certifying Agencies who have met the Commission's standards are: American Medical Technologists; Board of Registry of the American Society of Clinical Pathologists; Commission on Dietetic Registration of the American Dietetic Association; Credentialing Commission of

tifications, are used to communicate important information about quality of personnel to employers, consumers, public and private insurance agencies and government authorities. Although the standards set by the National Commission remain largely voluntary, states, insurance carriers, employers, and the federal government, through agencies such as the Centers for Disease Control, Office of Personnel Management, Health Resources Administration, Federal Trade Commission, Veterans Adminis-

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the International Society for Clinical Laboratory Technology; Dental Assisting National Board; Division of Examiners of the American College of Nurse-Midwives; National Board of Chiropractic Examiners; National Board for Respiratory Therapy; National Certification Agency for Medical Laboratory Personnel; National Commission on Certification of Physician's Assistants; National Registry of Microbiologists of the American Society for Microbiology.

Other organizations which are members of the Commission but which do not certify are: American Academy of Physician Assistants; American Association for Respiratory Therapy; American Association of Bioanalysts; American Dental Assistants Association; American Hospital Association; American Orthotic and Prosthetic Association; American Society of Allied Health Professions; American Society for Medical Technology; Contact Lens Society of America; Minnesota Department of Health; National Federation of Societies for Clinical Social Work; National Society for Histotechnology; Society of Nuclear Medicine.

Conditional members of the Commission are: American Board for Certification in Orthotics and Prosthetics; American Board of Opticianry; American Certification Council for Medical Rehabilitation Therapists and Specialists; American College of Nursing Home Administrators; American Registry of Diagnostic Medical Sonographers; Biofeedback Certification Institute of America; Commission on Rehabilitation Counselor Certification; Joint Commission on Allied Health Personnel in Ophthalmology; Liaison Council on Certification of the Association of Surgical Technologists; Nuclear Medicine Technology Certification Board.

The National Association for Music Therapy is a Commission affiliate. Approximately twelve other organizations are currently involved in seeking membership in the National Commission.

tration, and National Institute for Alcohol Abuse and Alcoholism, consult extensively with the National Commission and rely on its processes as fair, valid and objective statements serving the public interest.[2]

This case involves safeguards against conflicts of interest in the setting of health, safety and other important standards. Thus, the National Commission and its members may be significantly affected by the outcome of the case. Approximately one million health care practitioners practice under competency determinations made by the member organizations of the National Commission. In addition, several million other individuals employed in health and non-health disciplines have been evaluated under standards formulated by the National Commission. Consequently, the opinions of the National Commission on the use of organizational structure and procedures to safeguard against conflicts of interest have national importance.

2. The amicus curiae offers substantially different analysis of significant questions of fact and law.

Our analysis differs from that of petitioner and all other standard-setting amici, as we believe the focus of this and other standard-setting cases must be on the

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[2] Standards promulgated by the National Commission establish the following requirements, among others, for voluntary agencies certifying members of health occupations and seeking National Commission membership: public members must be involved in the governance of certification programs; representatives of the certified profession similarly must be involved; certification examinations must be valid and reliable measurement instruments; cut-off scores on certification examinations must be technically defensible; requirements for certification must not include excessively high academic requirements that could operate unfairly to restrict entry into the job market, limit minority opportunities, or protect high labor costs; certification boards must be administratively independent from professional associations (which have a clear interest in high entry standards); and individuals who fail to obtain certification must have a right of appeal. These concepts reflect safeguards against conflicts of interest in certification.

process of standard-setting and on the *duty* of standard-setting organizations to the public to arrange this process so as to safeguard it against inherent commercial and political conflicts of interest. We believe that the law of conspiracy and its broad proof requirements govern this case, and that undue reliance upon concepts of "agency" or "subjective agent intent" is erroneous, would mislead the lower courts in future standard-setting conspiracy cases, and would leave the public without adequate protection in an area vital to their well-being.

We conclude that the Court of Appeals, the American Society of Mechanical Engineers (ASME) and the other amici have severely underestimated the importance of this Court's decisions affecting professionalism in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and the decision concerning professional self-regulation in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

We take no position whatever on the alleged liability of ASME.

We believe this case will and should affect the quality of the entire system of private decision-making on matters of public trust for years to come.

Respectfully submitted,

KIM ZEITLIN
950 25th Street, N.W.
Washington, D.C. 20037
(202) 337-3894
Attorney of Record for Amicus Curiae

Of Counsel:
NEIL E. WEISFELD
NATIONAL COMMISSION FOR HEALTH CERTIFYING AGENCIES
1101 30th Street, N.W.
Washington, D.C. 20007
(202) 333-9300

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE NATIONAL COMMISSION FOR HEALTH CERTIFYING AGENCIES

INTEREST OF THE AMICUS CURIAE [1]

The interest of the amicus curiae is set forth in the motion for leave to file as amicus curiae. That motion is annexed to this brief.

COUNTERSTATEMENT OF THE CASE

This summary of the facts is drawn from the opinion of the Court of Appeals, 635 F.2d 118 (1980), and the Joint Appendix (J. App.).

[1] The National Commission is grateful for the substantial assistance of Tresa Schlecht, a candidate for admission to the District of Columbia Bar, and Vickie Bennett, M.S.W., in the preparation of this brief.

Hydrolevel Corporation (Hydrolevel) made safety devices to protect the public against personal injury and death from exploding boilers.

The American Society of Mechanical Engineers (ASME) conducts a process for establishing and interpreting standards for boilers and over 400 other devices. These standards are relied on by the public and incorporated in state legislation as impartial and objective evaluations of quality. ASME represents them to be such.

In 1971-1972 two ASME members, selected by ASME to interpret standards, were paid by competitors of Hydrolevel and intentionally used their positions in the ASME standards program to drive Hydrolevel out of the boiler safety device business.

The chief ASME members who were selected by ASME to interpret standards and who participated in this scheme were Messrs. T. R. Hardin, executive vice-president of Hartford Steam Boiler Inspection and Insurance Company (Hartford, the country's leading seller of boiler insurance to the industry) and John James, vice-president of research at McDonald & Miller (M&M, a corporation manufacturing up to 85 percent of the float cutoffs that were directly competitive with Hydrolevel's probe device). Hardin and James secretly drafted a letter to ASME requesting a code "interpretation." The ASME "answer" was written by Hardin, but signed by Mr. W. Bradford Hoyt, an ASME official who routinely signed such letters without supervising or reviewing the conditions of their preparation or their content. This misleading letter was used by M&M to disparage Hydrolevel's product to the trade.

The affair came to the attention of the public in June 1974 through the work of a reporter for the *Wall Street Journal*, Ms. Priscilla S. Meyers. Shortly after Meyers' first article concerning ASME was published, Mr. Paul

T. Howse, Jr., a member of ASME's governing board and ASME regional vice-president, wrote the ASME president, Dr. Rogers B. Finch, in July 1974:

> If the facts are as stated in the article, it would seem that Mr. James should not only be relieved of his duties on the boiler code committee but he should also be kicked out of ASME for unethical conduct. J. App. 99.

Thereafter, ASME's Professional Practice Committee (PPC) conducted an official investigation and promulgated a resolution which was circulated to ASME's 90,000 members, public libraries and others through ASME's official magazine, *Mechanical Engineering*. That November 19, 1974 resolution stated: "PPC investigated the entire [Hydrolevel] incident and found no basis for further consideration of the issue." J. App. 103. This official resolution commended James for his "forthright manner," condemned "harassment" of ASME members serving "in their line of duty," and concluded that ASME procedures for handling code interpretation inquiries were "extremely well-founded." J. App. 104.

In March 1975, Hydrolevel's concerns received more detailed attention in the forum of the United States Senate. In testimony before the Senate Subcommittee on Antitrust and Monopoly, James admitted his destruction of relevant and material documents.

The Court of Appeals did not conclude that ASME maintained a serious, systematic program to prohibit, detect, investigate, or discipline conflict of interests. Hardin and James were never disciplined by ASME.

On February 14, 1979, a jury sitting in the United States District Court for the Eastern District of New York found ASME to be a co-conspirator to an unreasonable restraint of trade in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. On Novem-

ber 24, 1980, the judgment of liability under Section 1 was affirmed by the United States Court of Appeals for the Second Circuit.

SUMMARY OF ARGUMENT

Standard-setting organizations have a duty to safeguard their processes against conflicts of interest.

An important antitrust problem in standard-setting is that conflicts of interest can impair the objectivity of judgment and exclude competitors. The solution to this problem is for the organization to use structures and procedures which satisfy the technical interest in competence, the public interest in objective judgment of quality, and the antitrust interest in avoiding wrongful market exclusions.

If an organization does this, it has complied with its duty to the public. Evidence of an organization's structures and procedures are admissible in its defense to show that, because it met its duty to safeguard against conflicts of interest, its conduct was reasonable under the Rule of Reason and that it did not intentionally participate in a conspiracy to restrain trade.

Traditional law of agency alone is not a suitable concept to evaluate the overall standard-setting process under the antitrust laws.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT AN ORGANIZATION OF COMPETITORS WHICH SETS STANDARDS TO CONTROL MARKET ENTRY HAS A PUBLIC DUTY TO SAFEGUARD ITS STANDARD-SETTING PROCESS AGAINST CONFLICTS OF INTEREST

A. Preliminary Statement

The private standard-setting process, which is the subject of this case, affects the daily life of each American:

> Trade product standards are an area of our economy known to few consumers. Yet, as is often the case with such backwaters of corporate activity, trade standards have an enormous impact on our lives. Over 20,000 trade standards at least partly determine the safety, availability and price of products ranging from household gas stoves to nuclear reactors. For consumers, trade product standards determine such things as the length of shoelaces, width of auto tires, ingredients of house paint, the specifications of lawn mowers, sizes of door frames, and safety of child car seats.

Curran, "Industrial Standards, Antitrust and the Logic of Public Action: An Historical Search for a Rational Public Policy," 17 Duq. L. Rev. 717, 717-18 n. 4 (1978).

Individuals and organizations are prohibited by the antitrust laws from joining with others to restrain trade. If they do so, they may be liable for triple the amount of damages which their joint action causes.

Some standard-setting organizations are groups of competitors which jointly set conditions for participation in a market or occupation. The integrity of standard-setting can be compromised by conflicts of interest. These conflicts threaten objective evaluation and can decrease quality, increase prices, thwart innovation, and completely

exclude a new competitor. These results can, in some instances, violate the antitrust laws. At the same time, the antitrust laws also recognize that private standard-setting can make significantly procompetitive contributions to quality, price, innovation, and the climate of a vigorous, competitive market. Technical expertise is essential to intelligent standard-setting, and those who maintain this expertise on a day-to-day basis through work in the field are able to apply knowledge and insight difficult to obtain elsewhere.

The solution to the antitrust dilemma in standard-setting is for the process to reconcile the technical professional requirements of expertise, the public interest in impartial and objective evaluation (particularly where health and safety are concerned) and the economic interest in eliminating unreasonable barriers to entry.

The principle that evidence of a standard-setting organization's process is admissible in an antitrust case is the rule of law which assures the successful balancing of these interests.

This brief will discuss in some detail how the antitrust laws apply to the standard-setting process, and examine why the analysis of the panel and ASME is inaccurate.

B. The Duty to Safeguard Against Conflicts of Interest Derives from Powerful Sources.

In its opinion below, the Court of Appeals correctly held that ASME, as an organization of competitors, had a duty to safeguard its processes:

> ASME's widespread influence through its Code carries with it a corresponding duty to guard against the misuse of such influence.

635 F.2d at 122. The Court's holding continued:

> [T]here is a corresponding duty to be aware of and guard against the temptations thus afforded by in-

> herent conflicts of interest. Absent some internal review procedures, no individual should be empowered to rule dispositively on the fitness of a competitor's product. When an organization has placed a person in a position to do what Hardin did, without any check or supervision, it must bear the consequences.

Id. at 126.

In short, the panel held that a standard-setting organization of competitors has a duty to establish safeguards against conflicts of interest. The National Commission supports this position.

The most fundamental source of the duty is the standard-setting process itself. To be reliable, the process must be objective and impartial. Conflicts of interest destroy fragile but cherished objectivity.

Standard-setting has a responsibility to provide truthful commercial information to the public. Consumers have a First Amendment right to receive truthful commercial information free from restraint. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Yet conflicts of interest directly jeopardize the truthfulness of standard-setting information. The technical nature and confidentiality of much standard-setting frequently leaves the public with no basis for receiving or evaluating information concerning quality beyond the very decision produced by the process itself.

Because the market cannot readily adjust for standard-setting errors after the fact—especially where human health and safety are concerned—conflicts of interest must be forestalled through proper procedures *at the outset*. The standard-setting *organization* directly controls its own processes, and the *organization* bears the duty to safeguard against conflict-of-interest dangers through those processes. Standard-setting organizations assure the public that they provide a process for im-

partial and objective judgments. State legislatures accept those statements and incorporate codes into state law, and the public expects standard-setting to be free from conflicts of interest.

Moreover, self-regulation in the public interest includes the duty to provide procedural safeguards to ensure high ethical standards. *See Silver v. New York Stock Exchange*, 373 U.S. 341, 366 (1973). Prohibitions against conflicts of interest are one such important ethical standard. *United States v. Mississippi Valley Generating Co.*, 364 U.S. 521, 549 (1964).

A further source of the duty is the responsibility of professionals to avoid conflicts of interest. This stems partly from their professional responsibility to use knowledge objectively. *See* Barber, "Some Problems in the Sociology of the Professions," in THE PROFESSIONS IN AMERICA 18 (K. Lynn Ed. 1965). It also stems from their responsibility to serve the public. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 687 (1978), *citing Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-89 n. 17 (1975).

Anticompetitive conflicts of interest are a subject of concern to the antitrust laws. In *Goldfarb*, for example, this Court ruled that associations "may not foster anticompetitive practices for the benefit of their members." 421 U.S. at 791. In that antitrust case, the Court relied on *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973), which ruled that a legal requirement that a professional association control a state licensing board can lead to a violation of the Fourteenth Amendment. In addition, the Clayton Act addresses conflicts of interest present in the dual loyalties of certain interlocking directorates. 15 U.S.C. § 19. Finally, the use of organization and pro-

cedure to solve the conflict-of-interest antitrust problem in standard-setting is a familiar solution in the antitrust literature:

> The problem is to organize a standards program which does not promote the interests of one group to the detriment of another, and which permits disinterested resolution of the conflicts created by the participation of persons with a variety of interests.

Wachtel, "Product Standards and Certification Programs," 13 Antitrust Bull. 1, 13 (1968). *See* 16J von Kalinowski, BUSINESS ORGANIZATIONS § 61.04 [1] n. 4 (Rel. 762) (1981), *citing Hydrolevel Corp. v. American Society of Mechanical Engineers*, 635 F.2d 118 (2d Cir. 1980).[2]

The National Commission is an organization which is aware of its duty to safeguard against conflicts of interest, and regards that duty as a serious responsibility. A liability rule which allows it to demonstrate that it has met its responsibility under the Rule of Reason and the law of conspiracy will permit and encourage the National Commission and its members to continue their work.

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[2] *See also* Comment, "Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason," 66 Colum. L. Rev. 1486, 1504-05 (1966); Kissam, "Antitrust Law, The First Amendment, and Professional Self-Regulation of Technical Quality," in REGULATING THE PROFESSIONS 143, 155 (R. Blair & S. Rubin, eds., 1980); Levin, "The Limits of Self-Regulation," 67 Colum. L. Rev. 603, 643 (1967).

II. THE COURT OF APPEALS CORRECTLY RULED THAT IF A STANDARD-SETTING ORGANIZATION MEETS ITS PUBLIC DUTY TO SAFEGUARD ITS PROCESS AGAINST CONFLICTS OF INTEREST, IT IS NOT A CO-CONSPIRATOR TO AN UNREASONABLE RESTRAINT OF TRADE

The question before the Court is whether ASME violated its duty to the public by "intentionally" participating in a conspiracy to drive Hydrolevel out of business. The analysis therefore turns on the meaning of "intent" under the law of conspiracy. The National Commission believes that intent can best be evaluated by looking at whether the standard-setting organization as a whole met its duty to safeguard its processes against conflicts of interest.

A. Intent is an Important Consideration Under the Rule of Reason and the Law of Conspiracy.

Under the Sherman Act, a conspiracy to create an unreasonable restraint of trade is illegal. A standard-setting organization may raise several defenses to allegations that it violated the Sherman Act. Two of the most important defenses are that any restraint of trade was reasonable, and that if any unreasonable restraint did occur, the organization did not *intentionally* participate in it.

To evaluate the first of these defenses—the reasonableness of any restraint—the law considers the nature of the restraint. *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) (Brandeis, J.). The nature of certain types of restraints such as price-fixing are so completely without competitive justification that they are declared illegal *per se*. The nature of other types of restraints may have procompetitive justifications. Those restraints and justifications are governed by an analysis known as the Rule of Reason. Because objective and valid standard-setting processes can foster higher quality, lower costs, increased innovation and ease of market entry, standard-setting is governed by the Rule of Reason. *See*

Maple Flooring Manufacturers Association v. United States, 268 U.S. 563, 566 (1925); 16J von Kalinowski, BUSINESS ORGANIZATIONS § 61.04[1] (1981).

In evaluating the reasonableness of any standard-setting restraints under the Rule of Reason, the courts look to intent because it "may help the Court to interpret facts and to predict consequences." *Chicago Board of Trade v. United States*, 246 U.S. at 238. The presence of safeguards, and the rigor with which they are applied, are important in demonstrating an organization's intent. Other factors important in a Rule of Reason case are the facts peculiar to the business in which the restraint is applied, the history of the restraint, the reasons for its adoption, and as already noted, the nature of the restraint itself. *Chicago Board of Trade v. United States*, 246 U.S. at 238. These factors may be used to evaluate intent.

Conflict-of-interest safeguards are ethical norms which may be procompetitive and are therefore governed by the Rule of Reason. In *National Society of Professional Engineers v. United States*, 435 U.S. 679, 696 (1978), this Court stated:

> Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason.

The unreasonableness of the conspiracy to drive Hydrolevel out of business is not disputed now by ASME. However, ASME does dispute the jury finding that it intentionally participated in that conspiracy.

B. The District Court Correctly Instructed the Jury on the Law of Conspiracy.

In his charge Judge Weinstein instructed the jury that ASME must have "intentionally" participated in a conspiracy before it could be held liable. He also told the jurors that "intentional" participation has a special meaning under the law of conspiracy. He informed them that knowing acquiescence, pervasive participation in a com-

mon scheme or plan, the natural or probable consequences of acts, and specific intent are *all* tests for knowing, *intentional* participation under the law of conspiracy. J. App. 1006, 1007, 10011, 1012, 1018. These instructions were correct. *E.g., United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 146-47 (1948); *United States v. General Motors Corp.*, 384 U.S. 127, 143 (1966); *Eastern States Lumber Association v. United States*, 234 U.S. 600, 612 (1914).

In addition to this basic conspiracy charge, Judge Weinstein also instructed the jury that ASME was liable for its agents' acts only if:

1. ASME ratified the acts; *or*
2. ASME agents acted to advance ASME's interest.

Although the instruction was favorable to ASME, the jury found in favor of Hydrolevel. Thus any error in this instruction was harmless.

Since the basic conspiracy instructions were correct, this Court would ordinarily limit review to the sufficiency of the evidence on conspiracy. In this case, however, the Court should go beyond evidentiary review and correct the seriously misleading analysis of the Court of Appeals.

C. The Court of Appeals Correctly Stated the Basic Elements of a Conspiracy in a Standard-Setting Case.

The Court of Appeals ruled that ASME was liable as a co-conspirator because three conditions were met:

1. *Unreasonableness.* "The effect and intent of the . . . interpretive letter and its subsequent misuse by M&M" created an unreasonable restraint of trade by wrongfully driving Hydrolevel out of business, 635 F.2d at 124;
2. *Participation.* ASME was liable because Hardin acted with "apparent authority," 635 F.2d at 124-25; *and*

3. *Safeguards.* ASME failed to provide "check or supervision" to "guard against" both "temptations thus afforded by inherent conflicts of interest" and "misuse of ASME's influence." 635 F.2d at 125.

In effect, the Court of Appeals held that as one type of evidence, a standard-setting group may show to a jury that it carefully safeguarded its processes against conflicts of interest. If this has been done, the defendant organization has shown that it was not an intentional participant because: it did not knowingly acquiesce; it did not join a common plan; the natural and probable consequences of its acts were not to restrain trade unreasonably; and it had no specific intent to become a member of a conspiracy.

The Court of Appeals correctly established the elements of a standard-setting conspiracy case. However, it reached this result without using antitrust concepts. It selected "apparent authority" as the focus of its analysis to describe the standard-setting organization's participation in the conspiracy. This analysis is misleading as applied to the law of conspiracy.

D. The Court Will Avoid Future Confusion by Discussing Conspiracy in Traditional Antitrust Terms.

1. *The Method for Proving Intent Should Be Clarified.*

In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), this Court set forth the correct method of evaluating proof in an antitrust conspiracy case:

> The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but by looking at it as a whole.

This fundamental rule of proof is essential in antitrust conspiracy cases, for proof on the conspiracy issue is often circumstantial. *American Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 221 (1939).

In contrast to this broad rule of proof, a rule which would restrict proof to the technical common-law requirements of agency would improperly substitute form for substance in conspiracy cases. *United States v. General Electric Co.*, 272 U.S. 476 (1926); *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911). Surely the issue of whether an individual is or is not an "agent" is not controlling in the evaluation of the existence of conspiracy. *E.g., United States v. Masonite Corp.*, 316 U.S. 265, 276-77 (1942).

In a standard-setting case, the determination whether an organization intentionally participated in a conspiracy turns on the actual processes of the organization. These processes may include procedures for disclosure of conflicts of interest, structure of committees to achieve the broadest representation of interests, fair and broadly based development and interpretation of standards, selection and involvement of public representatives, and discipline. The most probative evidence of intent is what the organization at large did to prohibit, inquire into, investigate and discipline for conflicts of interest *before* any abuses, *cf. Silver v. New York Stock Exchange*, 373 U.S. at 348 n.5, and what it did after an abuse to redress the situation.

2. *The Law of Conspiracy and Its View of Agents Should Be Clarified.*

The Court of Appeals altered the rules of evidence by reverting to narrow agency principles instead of relying on the trial record. 635 F.2d at 124-126. This Court should correct the error.

As a sole determinant of liability, traditional agency rules as used by the Court of Appeals and ASME impair the ability of standard-setting organizations to demonstrate intent and are clearly unworkable for a variety of reasons. These reasons include: (a) the nature of conspiratorial danger; (b) traditional use of agency law in conspiracy cases; (c) the relationship between standard-

setting organizations and the public; (d) the clear trends in agency and private association law; (e) new problems facing the nation which the standard-setting community must be equipped to address; and (f) technical defects in the use of apparent authority and actual authority in conspiracy cases.

(a) The Court of Appeals squarely rested its direct use of agency law to confer treble damage liability on an analogy. The analogy centered on the liability of principals for the torts of their agents under the Restatement of Agency. This analogy was erroneous. Treble damages for civil antitrust conspiracies are imposed due to the dangers of injury created by *joint* action. Only single damages are imposed upon principals for injuries caused by agent conduct. Before treble damages can be imposed under the antitrust laws, the jury must find both intent and *concerted* action.

(b) The Court of Appeals also did not review how the law of conspiracy treats agents. As previously explained, the major focus of conspiracy is intent. In conspiracy, where an agent (James or Hardin) acts intending to benefit an entity (M&M or Hartford), his acts become those of the entity (M&M or Hartford).

The case law illustrates this principle in two ways. In civil or criminal *per se* price-fixing conspiracy cases, an agent who fixes prices intends at least in part to benefit his company—and the company is responsible. *See United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1976). Secondly, where an agent intends to benefit himself or a company *other* than his own, he then is capable of conspiring with his *own* company. *See Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 469-70 (1962); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953). *See also* 16 von Kalinowski, BUSINESS ORGANIZATIONS, § 6.01[2] and cases

cited therein. By using its apparent agency analysis, the Court of Appeals ignored the intent of James and Hardin to benefit *M&M and Hartford*, not ASME.

Under traditional conspiracy law, the analysis would be: (i) James and Hardin acted for M&M and Hartford and were therefore capable of conspiring with ASME; (ii) the procedures which ASME agents designed before the action of James and Hardin, and the actions ASME agents took afterward, are relevant evidence of ASME's intent; (iii) the actions of James and Hardin are relevant in interpreting ASME's intent. Conspiracy law would *not* attribute the acts of James and Hardin to ASME, and no case cited by ASME (other than *Hydrolevel*) is to the contrary.

(c) The use of agency law here misconceives the public's relationship with the standard-setting process. The public relies on the imprimatur and influence of the professional organization. The public is largely indifferent to individual actors within the organization.

Traditional agency analysis is artificial as applied here. ASME acted much as an agent of the public in setting standards. *See* Kaplin, "Professional Power and Judicial Review: The Health Professions," 44 Geo. Wash. L. Rev. 710, 724-25 (1976). James and Hardin acted as ASME's sub-agents. But as co-conspirators, James and Hardin were not acting as agents on behalf of the public. Any traditional agency analysis which ignores ASME's relationship to the public or which imputes any acts or intent of James or Hardin to the public is clearly inapplicable in this setting.[3]

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[3] The result in *UMW v. Coronado Coal Co.*, 259 U.S. 344 (1922), relied on by ASME, was rejected by statute in Section 301(e) of the Labor-Management Relations (Taft-Hartley) Act, 29 U.S.C. § 185(e). Congress felt that the actual authority analysis used to deny liability there for the acts of an international union did not reflect the significant responsibilities of unions to their members and the public. *UMW v. Patton*, 211 F.2d 742, 747-50 (4th Cir.), *cert. denied*, 348 U.S. 824 (1954).

(d) Current trends in agency law also suggest the limitations of agency concepts in standard-setting. After the limitations of the doctrine of actual agency authority became clear, the more flexible doctrine of apparent authority developed to confer liability on principals. More recently, when the analytic limits of apparent authority were identified, liability of principals was further extended under the doctrine of implied agency power. Restatement (Second) of Agency § 8A. The law should now recognize that traditional agency concepts, however suitable they were for simple one-to-one business relationships, are outmoded as tools for the evaluation of the wide-ranging public responsibilities of standard-setting organizations today. Indeed, old notions of self-regulating associations as "private clubs," unaccountable to the public, already have been rejected. *Silver v. New York Stock Exchange*, 373 U.S. at 351. *See* Kaplin, "Professional Power and Judicial Review: The Health Professions," 44 Geo. Wash. L. Rev. at 725.

The Second Restatement of Agency takes no position on the applicability of agency law to social legislation. Restatement (Second) of Agency, Introduction at 3 (1959). Nor does it take a position on the applicability of agency rules to punitive or treble damage situations. Restatement (Second) of Agency § 217, Comment c (1959). There is no need for this Court to superimpose agency concepts upon the law of conspiracy where the American Law Institute, on which the Court of Appeals so heavily relied, refrained.

(e) Standard-setting organizations will expand activities in extraordinarily sensitive areas, such as genetic engineering and nuclear technology. Report of the President's Commission on the Accident at Three Mile Island 70-71 (1979). The concept of agency completely fails to provide a framework to evaluate contemporary standard-setting responsibilities. These responsibilities sometimes are so complex and profound that they may

require extensive consultations and gradations of decisions—in contrast, for example, to ratification of the acts of a single agent under the model of agency law. In addition, the roles of all involved parties, such as researchers, educators, volunteers, entrepreneurs, professionals and consumers are so intricately interwoven that the other pillar of agency liability—the agent's intent—may be too obscure to identify accurately.

(f) Finally, there are technical flaws with both apparent authority and actual authority in analyzing the standard-setting process in a conspiracy case.

A rule of apparent authority in conspiracy cases, without more, is clearly unsatisfactory. In effect, it would eliminate intent and create a strict liability conspiracy case. But the plaintiff in a conspiracy case must *prove* the issue of conspiracy to the jury; it cannot be decided as a matter of law. *Beacon Theatres v. Westover*, 359 U.S. 500 (1959). In addition, a strict liability apparent authority rule would discourage the insurance industry from insuring standard-setting organizations because organizations would then be liable irrespective of their conduct.

ASME's use of actual authority also presents a variety of objectionable features. A corporation acts through its agents. Actual authority requires a showing that the agent intended to benefit the principal. ASME points to agents who lack intent to benefit ASME (James and Hardin)—but it ignores the acts of many others who have that intent and have actual authority (*e.g.*, Hoyt, the resolution committee members, the preparers of ASME standard-setting procedures which contain or lack conflict-of-interest safeguards). Use of the conflicts of interest of selected agents in this manner would divert the antitrust case from the competitive problem of the effect of conflicts of interests on market entry. An actual authority defense would also be counterproductive from

the standpoint of an antitrust counseling, for it would encourage standard-setting organizations to dismantle vital procedural safeguards in order to minimize the involvement of agents who could create liability.

Since actual authority would severely narrow proof of conspiracy intent under the Sherman Act, and the Sherman Act has both civil and criminal features, modification of the elements of conspiracy under the Sherman Act could well affect proof of a conspiracy under the general criminal conspiracy statute, 18 U.S.C. § 371.

The rule of actual authority would seriously undermine this Court's holding in *National Society of Professional Engineers*, for even if a restraint were unreasonable under *Professional Engineers*, an association which created the restraint could escape liability by pointing to a single agent's subjective intent that did not involve benefiting the association. Since intent is relevant under both conspiracy law and the Rule of Reason, *Chicago Board of Trade v. United States*, any alteration in the rules of proof for intent would impair careful analysis of conflict-of-interest prohibitions under *Professional Engineers* where the reasonableness of those restraints, including their intent, is at issue.

E. The Analysis of the National Commission Addresses the Legitimate Concerns of the Amici, the Standard-Setting Community and the Public.

The rule advocated by the National Commission is that a standard-setting organization may defend itself in an antitrust case, using evidence of its actual standard-setting safeguards, to show that any restraint of trade was not unreasonable and that it did not intentionally participate in any conspiracy. The position of the National Commission does not subject standard-setting groups to undue risk of liability, but rather leaves within their control the ability to fashion procedures to fit their individual standard-setting needs.

The rule advocated by the National Commission harmonizes the technical interest and the public interest by encouraging organizations to develop procedures to ensure objective judgment. Most importantly, our solution is realistic and serves the public interest. It would not completely disqualify from participation in standard-setting all who have a commercial interest. Blanket disqualification would injure the professional interest in having expert judgment available and thus would jeopardize the quality of the standard-setting result. Our solution would require standard-setting groups carefully to examine each step in their processes where conflicts of interest could intrude and then structure their processes to limit conflicts of interest appropriately.

III. THIS CASE HAS BROAD SIGNIFICANCE BEYOND THIS SPECIFIC LITIGATION

This case is extraordinarly important, because the Court's decision will direct the entire system of standard-setting. The decision and analysis underlying it will be the framework that a wide variety of groups will use to decide whether to set standards, how to assure accountability to the public, how to structure their organizations and processes, and how best to interact with related organizations and their members.

The distribution of decision-making power between a government that is relinquishing authority and a private sector that is assuming it is being extensively realigned, concurrently with the Courts' consideration of this case. The Court has an unusual opportunity to supply timely predictability to standard-setting organizations and the lower courts.

Of particular concern now is the rapid advance of technologic developments affecting human life and safety. This case can lead the way in the evolution of guidelines that must reconcile the pressures of commercial interests, scientific progress, and public protection.

CONCLUSION

For the foregoing reasons, the National Commission for Health Certifying Agencies urges that the Court rule as follows:

1. In an antitrust conspiracy case, evidence of a defendant standard-setting organization's structure and procedures are admissible on the issues of conspiratorial intent and reasonableness of a restraint of trade under the Rule of Reason.

2. The law of agency cannot foreclose a standard-setting organization from introducing proof on the responsibility of its structures and procedures.

3. If the verdict of the jury in this case is not supported by the evidence, the judgment of the United States Court of Appeals to the Second Circuit should be reversed.

4. If the verdict of the jury in this case is supported by the evidence, the judgment of the United States Court of Appeals should be affirmed.

Respectfully submitted,

KIM ZEITLIN
950 25th Street, N.W.
Washington, D.C. 20037
(202) 337-3894
Attorney for Amicus Curiae National Commission for Health Certifying Agencies

Of Counsel:
NEIL E. WEISFELD
NATIONAL COMMISSION FOR HEALTH CERTIFYING AGENCIES
1101 30th Street, N.W.
Washington, D.C. 20007
(202) 333-9300

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APPENDIX

Statutes Involved

Sherman Act, Sections 1-2
15 U.S.C. §§ 1-2

§ 1. *Trusts, etc., in restaint of trade illegal; penalty*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. *Monopolizing trade a felony; penalty*

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

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No. 80-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN SOCIETY OF
MECHANICAL ENGINEERS, INC.,
Petitioner

v.

HYDROLEVEL CORPORATION,
Respondent

On Writ of Certiorari To The United States Court of Appeals For The Second Circuit

BRIEF OF THE NATIONAL FIRE PROTECTION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AMERICAN SOCIETY OF MECHANICAL ENGINEERS

DANIEL J. PILIERO II
General Counsel
National Fire Protection
Association
WEBSTER, CHAMBERLAIN & BEAN
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 785-9500

Of Counsel:

MYRREL C. HENDRICKS, JR.
WEBSTER, CHAMBERLAIN & BEAN
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 785-9500

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No. 80-1765

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INTEREST OF THE NATIONAL FIRE PROTECTION ASSOCIATION AS AMICUS

The National Fire Protection Association (hereinafter "NFPA") is a not-for-profit educational, voluntary membership organization dedicated to the protection of liability and property from fire. By consent of the parties NFPA respectfully submits this brief as Amicus Curiae, urging that the Supreme Court reverse the unprecedented and erroneous vicarious liability standard adopted below by the Second Circuit.[1]

[1] The opinion below acknowledges that it adopts a theory of liability which was not presented to the jury. 635 F.2d 118, at 124.

Founded in 1896, NFPA draws its approximately 32,000 members from all segments of society including professional firefighters, educators, businessmen, architects, engineers, and other members of the public interested in fire safety.[2] NFPA is truly an international organization attracting members from across the United States and Canada and from 85 other countries. The principal goal of NFPA is to protect man and his environment from fire by serving as a catalyst to identify and address fire safety issues.

The activities of NFPA in furtherance of this mission consist primarily of educational programs and technical standards development. NFPA's technical standards activity involves the development, publication and dissemination of current consensus standards intended to minimize the possibility of fire and the risks to life and property associated with fire in contemporary society. NFPA's educational efforts are directed to general public of all ages to educate them to avoid loss of life and property from fire by making good fire safety habits a way of life.

Through its 167 volunteer technical committees NFPA develops and continually updates[3] approximately 240 codes[4] and product standards[5] encompassing virtually every aspect of fire safety and fire protection. Because they represent the collective efforts of experts in many fields and are technically accurate, many of the standards and codes developed by NFPA are adopted directly into law or serve as a model for laws on the federal, state, and local level. Many businesses and industries voluntarily follow NFPA fire safety standards for internal fire safety protection. NFPA fire safety standards are also used extensively by insurance authorities for risk evaluation and premium rating purposes.

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[2] See graph Appendix I.

[3] Such updating is a continuous process which guarantees that the fire safety standards incorporate the most recent technological developments.

[4] The best known of the NFPA codes are the Life Safety Code and the National Electrical Code.

[5] A standard is a technical document which generally provides safety or performance specifications for a particular product or class of products.

The effect of these codes and standards can be seen everywhere. Smoke detectors in homes, protective clothing for firefighters and fire safety features incorporated in public buildings, such as fire extinguishers, sprinklers, illuminated exit signs, and stairway fire doors are some of the more visible results.[6] Less visible areas addressed by NFPA codes and standards include hazardous materials transportation, flammable liquid storage, electrical wiring and firefighter qualifications.

NFPA's standards development has always been dependent upon the work of volunteers. Approximately 2,400 experts from business, industry, government, educational institutions and the general public volunteer their time. Through the coordinated efforts of these volunteers on the 167 NFPA Technical Committees, the 240 NFPA sponsored codes and standards are continually updated and kept current and meaningful.

Representation on the technical committees of many divergent interests and points of view serves to ensure that no one interest group can dominate or unduly influence a committee. The standards development process is completely open—such that any interested person may propose, or comment upon the adoption, modification, or withdrawal of any NFPA standard. These technical committee activities are conducted according to a detailed set of published official NFPA procedures.

The expertise and technical know-how that these 2,400 volunteers collectively are able to focus on fire safety and fire protection problems are a valuable resource. NFPA's standards process could not function effectively without the countless thousands of hours donated by these volunteers.

Hydrolevel's antitrust claims arise from the issuance of a single, interpretative letter concerning whether the incorporation of a time delay mechanism in a low-water boiler cut-off was acceptable under ASME's Boiler and Pressure

[6] Many municipal and county ordinances concerning fire safety measures for public buildings are taken practically verbatim from NFPA maintained codes and standards.

Vessel Code. Similar to ASME, an important component of NFPA's standards activities is providing technical advisory services, both formally and informally, to anyone with a legitimate concern. Through this service even persons with no special skills or expertise can utilize NFPA's fire safety codes and standards.

The theory of liability espoused by the opinion below imposes treble damage liability upon a voluntary standards developing organization based solely on the acts of disloyal volunteers, whose purposes are wholly contrary to those of the non-profit organization. Such liability against the non-profit organization is wholly unnecessary where, as in the case at bar the corporate employers of the disloyal volunteers, James and Hardin, were liable for the damages, if any, sustained by Hydrolevel Corporation. In practical terms the non-profit standards organization becomes an insurer against the unauthorized disloyal acts of a volunteer member, even though it had no knowledge of the unlawful acts and did not authorize or ratify them. Indeed, ASME corrected the wrongful acts promptly after learning of them. The standard of liability adopted by the decision below threatens the structural underpinnings of the voluntary standards development process—reliance upon volunteer committee members and their technical expertise.

If the opinion below is permitted to stand, it will imperil the ability of NFPA and virtually every other major standards developing organization to function effectively. At a minimum this new vicarious liability standard will greatly increase the cost and length of time necessary to maintain and interpret safety and performance standards. Many volunteers will choose not to serve rather than be burdened by the additional layers of procedural restraints that the decision below seems to contemplate. As a result, many organizations may be forced curtail their standards activities, especially the practice of providing technical and interpretative advice upon request from interested persons. Thus, the Court's decision in this case will have a broad direct impact upon the entire standards developing community—including NFPA.

INTRODUCTION AND SUMMARY OF ARGUMENT

This action was originally commenced against three defendants, including ASME, alleging a conspiracy to restrain trade or to monopolize in violation of Sections 1 and 2 of the Sherman Act, 15 USC §§ 1 and 2. ASME is a non-profit tax-exempt scientific membership society which develops voluntary performance and safety standards. Prior to trial, plaintiff settled with corporate defendants McDonnell-Miller Corporation[7] (hereinafter "M&M") and Hartford Steam Boiler Inspection and Insurance Company (hereinafter "Hartford") for $725,000 and $75,000 respectively.

ASME was sued based on the issuance and subsequent misuse by salesmen of M&M, of a single letter interpreting a section of ASME's Boiler and Pressure Vessel Code. This letter, dated April 29, 1971, was drafted by T.R. Hardin as chairman of the relevant subcommittee, in response to a letter of inquiry. Unknown to ASME, Hardin and John James, another volunteer committee member, had drafted the original inquiry. Neither the inquiry letter, nor the interpretation letter mentioned either Hydrolevel or its product. Hardin and James intended to use the ensuing response, as drafted by Hardin, to the advantage of M&M and Hartford, their employers. Subsequently, M&M and its sales personnel misrepresented the letter to potential purchasers claiming that Hydrolevel's product, which had a time delay mechanism, did not meet the relevant safety standard.

The case went to trial with ASME as the lone defendant. At the conclusion of the evidence the trial judge held that the evidence was insufficient to find ASME liable as an active participant in the alleged conspiracy.[8] The case went to the jury

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[7] M&M is an operating division of International Telephone and Telegraph Corporation (IT&T).

[8] The decision of the Second Circuit attempts to sidestep the trial judge's amply supported finding on this issue. Ignoring eighty years of prior Sherman Act precedent, the Second Circuit relied upon a misconstruction of the Restatement Second of Agency and upon *Gleason v. Seaboard Air Line Railway Co.*, 278 U.S. 349 (1929). (Common carrier held liable for misrepresentation concerning a bill of lading made by its employee.) Extension of liability to the non-profit standards organization under the Second Circuit's novel "unintentional participation" theory is wholly unnecessary because the true principals of the disloyal volunteers, M&M and Hartford, were liable for the damages, if any, sustained by Hydrolevel.

solely on the alternate theory that ASME may have acquiesced in, or ratified, the illegal acts in furtherance of the conspiracy. The jury returned a verdict against ASME in the amount of $3.3 million dollars prior to trebling.

On appeal ASME's principal contention was that the facts adduced at trial failed to show that it had knowingly and intentionally participated in the conspiracy or ratified the unauthorized actions of two volunteers. ASME also contended that volunteers James and Hardin did not intend to benefit ASME and therefore could not properly be "agents" of ASME in carrying out this scheme. Logically James and Hardin could not have intended to benefit ASME through their actions, rather they sought to benefit M&M and Hartford.

The panel chose to sidestep the arguments raised by ASME[9], and instead adopted a wholly new and unprecedented standard of liability premised on "apparent authority". Thus the liability of ASME was sustained on a theory that was never considered by the jury. 635 F.2d 118, at 124. The concept of "apparent authority" of an agent was transplanted and applied as the standard for measuring whether ASME had "unintentionally participated" in the antitrust conspiracy alleged by Hydrolevel.

The opinion below strongly suggests that ASME was held liable on a negligence or quasi-negligence standard for failure to exercise due care in supervising Hardin and James. The panel stated:

> Imposing liability on the principal [ASME] will induce greater care to prevent misconduct by agents occupying especially sensitive or responsible positions that invite reliance—a consideration of great importance in cases such as this where misuse of quasi-official standards and codes can so easily injure competitors. 635 F.2d 118, at 125.

Under the terms of the Sherman Act a conspiracy to restrain trade or to monopolize requires a deliberate and intentional commitment to a common plan, scheme or end.

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[9] One can surmise that the panel choose this course because the record was, as ASME had argued, insufficient to support a finding of liability without stretching to discover this new liability standard.

This Court has held on numerous occasions that participation in a Section 1 or 2 conspiracy requires a showing of deliberate and intentional participation in the conspiracy.[10] Absent such a showing judgment must be entered for the defendant as a matter of law.

Prior to the decision below no federal decision had ever held a defendant liable for "unintentional participation" in a Section 1 or 2 conspiracy. Indeed the "apparent authority" doctrine had been expressly rejected as inconsistent with the policies and purposes of Sections 1 and 2 of the Sherman Act.[11]

Noticeably absent from the decision below is citation of even a single antitrust decision on this issue. Perhaps the most troubling aspect of the decision below is the adoption of the "apparent authority" standard despite the lack of any reliance by the plaintiff. Such reliance is the genesis of the "apparent authority" doctrine as applied to intentional torts. Yet, it has never been suggested that Hydrolevel relied upon the authority of James and Hardin to act on behalf of ASME.

The decision below is a fundamental deviation from the principles governing participation in a conspiracy to restrain trade or monopolize. One can not be held liable for participation in Section 1 or 2 conspiracy without an intent to act jointly and at a minimum some knowledge of the illicit purposes of the conspiracy.[12] The panel has departed from this long established rule of law. In the process it creates an unwise and unsound new standard of antitrust liability. The Court should reverse the decision below which predicates Sherman Act liability of a non-profit standards organization upon "apparent authority" of two disloyal volunteer committee members.

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[10] *See e.g.*, American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946) and United States v. United States Gypsum Co., 438 U.S. 422, 443 n. 20 (1978).

[11] *See* United Mine Workers of America v. Coronado Coal Co., 259 U.S. 344, 395 (1922); Truck Driver's Local No. 421 v. United States, 128 F.2d 227, 235 (8th Cir. 1942); and United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972).

[12] American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946); United States v. General Motors Corp., 384 U.S. 127, 143 (1966); and United States v. United States Gypsum Co., 438 U.S. 422, 433 (1978).

ARGUMENT

I. THE PANEL'S DECISION EXTENDING VICARIOUS ANTITRUST LIABILITY BASED ON "APPARENT AUTHORITY" IS WHOLLY UNPRECEDENTED AND UNWARRANTED.

Sections 1 and 2 of the Sherman Act are designed to protect the natural balance of competitive forces in the marketplace. Protection and preservation of competition, not specific competitors, is the underlying goal. Hydrolevel's principal claim in this action was that issuance of the letter of April 29, 1971 and the subsequent misrepresentations thereof by M&M and its salesmen constituted a conspiracy in restraint of trade or to monopolize the low-water boiler cut-off market.

Under either §1 or §2 this Court has repeatedly required that a plaintiff demonstrate an intentional purposeful agreement among the alleged co-conspirators. *United States v. United States Gypsum*, 438 U.S. 422, 443 (1978) and *United States v. General Motors Corp.*, 384 U.S. 127, 143 (1966). The decision below stands in stark contrast to these precedents explicitly premising its conclusion concerning liability upon unintentional participation based on the disloyal acts of volunteers James and Hardin. 635 F.2d 118, 124-125.

The panel concluded that ASME was responsible in damages based on involvement of James and Hardin in the conspiracy alleged by Hydrolevel. Under the panel's analysis it did not matter that:

> (1) the organization was without knowledge of the real motives and purposes of James and Hardin;
>
> (2) the conspiracy was not intended to benefit the organization; and
>
> (3) the organization was actively deceived by James and Hardin to benefit their actual principals.[13]

The panel's resolution of the liability issue charts an entirely new course for determining vicarious antitrust liability.

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[13] In this context, their employers M&M and Hartford.

The element of knowing intentional participation in the conspiracy to restrain trade or to monopolize is discarded. The panel substitutes a far different "apparent authority" standard which supplants the requirement of knowing and intentional participation. In adopting this standard the panel strains to analogize the conduct of James, Hardin and their co-conspirators to certain intentional torts. Under this analysis the panel concludes that the "apparent authority" standard controls on the facts of this case because Hardin's "conduct here was essentially a fraud, a willful knowing misrepresentation of the Code." 635 F.2d 118, at 125.

This novel and wholly inappropriate standard permits ASME to be held liable without regard for its lack of knowledge of, or participation in, the conspiracy alleged. The acts of two disloyal volunteers, who purposely deceived the organization to further the business interests of M&M and Hartford, are imputed to ASME. Application of this common law intentional tort standard is both erroneous and unprecedented.[14]

In reaching its conclusion the panel ignored a long standing principle of agency law that authority for an agent to commit criminal or tortious acts is not to be readily inferred.[15] This principle was recognized and applied in *U.S. v. Ward Baking.* The *Ward Baking Court* held for the defendant in a civil action brought by the government under the Sherman Act. The court held there was insufficient proof that "an agent of the defendant who had authority to bind it participated in any way in the conspiracy... or ratified such participation." 243 F.Supp. 713, at 717 (E.D. Pa. 1965).

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[14] *See e.g., Radiant Burner, Inc., v. Peoples Gas Light and Coke Co.*, 364 U.S. 656 (1961).

[15] The Restatement Second of Agency §34, comment (g) articulates this principle as follows:

Illegal acts. Authority to do illegal or tortious acts, whether or not criminal, is not readily inferred. Thus, the appointment of a person to act as manager does not thereby give him authority to make trade agreements as opposed to public policy that they will not be enforced, or to inaugurate illegal blacklists or boycotts, or to make fraudulent statements concerning his principal's goods.

Under this principle a non-profit standards organization, such as ASME, should not be liable unless it ratified, with full knowledge of the material facts, the acts of Hardin and James or unless Hardin and James intended to benefit ASME by their activities. The Restatement Second of Agency §§173, 235 and 236. Unless either of these tests can be satisfied ASME cannot properly be held liable. The decision below is directly contrary to this principle as relied upon in *Ward Baking, id.*

Similar to the case at bar, plaintiff in *Structural Laminates, Inc. v. Douglas Fir Plywood Association,* 261 F. Supp. 154 (D. Ore. 1966), sought treble damages alleged to arise from the exclusion by means of a voluntary product standard of a new product with a revolutionary design. Plaintiff plywood producer alleged that its innovative design for 3-ply half inch plywood was unlawfully excluded from the market by means of defendant's product standard.[16] Plaintiff urged that treble damages should be assessed regardless of whether the defendant voluntary association was found to have any unlawful intent or purpose. The trial court rejected this theory concluded:

> Absent a bad purpose what was defendant's antitrust liability? It was responsible for the commercial standards which did affect adversely the marketing of plaintiff's product. Plaintiff's 3-ply ½" was suitable for inclusion in the commercial standards, but 3-ply ½" plywood did bear a poor reputation in the industry in 1958. Had defendant been vigilant, it might have concluded in 1958, or sooner, what it did conclude in 1962—that the bad reputation was unjustified.
>
> If intent and purpose are factors in the anti-trust law, and the court believes they are except where *per se* violations are involved, then the mere failure of one who is responsible for the adoption of a commercial standard to appreciate changes which make that

[16] Plaintiff there alleged that his product was wrongfully refused certification under the existing standard which called for use of *more than* 3-plys (layers) in half-inch plywood.

> standard obsolete and to take immediate and effective action to alter it, does not amount to a conspiracy to restrain trade. Any system of standards presupposes that there are standard and non-standard items. Those who produce products which are not standard are to some extent penalized and trade is to some extent restrained. This much however is congressionally sanctioned and the court is of the opinion that in the absence of a bad purpose, mistakes made in the formulation or maintenance of standards do not subject the one making the mistake to anti-trust liability. (Footnotes omitted). 261 F.Supp. at 159.

Other federal decisions concerning alleged antitrust violations for standards developing activities have applied a similar liability test. *See e.g., Radiant Burners Inc. v. Peoples Gas Light and Coke Co.*, 364 U.S. 656 (1961); *Eliason Corp., v. National Sanitation Foundation*, 614 F.2d 126 (6th Cir. 1980); *cert. denied*, 49 USLW 3246 (October 7, 1980); and *Roofire Alarm Co. v. Royal Indemnity Co.*, 202 F.Supp. 166 (E.D. Tenn. 1962), *aff'd* 313 F.2d 635 (6th Cir. 1963), *cert. denied*, 373 U.S. 949 (1963). This conclusion is also implicit in this court's decision in *Coronado Coal v. United Mine Workers of America*, 268 U.S. 295 304 (1925). *Coronado Coal, id.*, squarely rejects the theory of "apparent authority" for purposes of imputing vicarious anti-trust liability.[17] The concept of reliance upon which such theory is predicated has no relevance to these facts or to the policies of protecting and preserving competition embodied in the Sherman Act.[18] *Accord, Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc. 429 U.S. 477, at 488 (1977), citing with approval, Brown Shoe Co. v. United States*, 370 U.S. 294, at 320 (1962).

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[17] For further discussion see ASME's Petition For Certiorari at 12-14. *See also*, Truck Drivers' Local No. 421 v. United States, *supra*, at 235.

[18] The element of reliance has no application to the policies embodied in the federal antitrust statutes, since such statutes protect competition and the natural functioning of the marketplace, not individual competitors. Brown Shoe Co. v. United States 370 U.S. 294, at 320 (1962).

II. THE PANEL'S DECISION WILL HAVE DEVASTATING CONSEQUENCES ON VOLUNTARY STANDARDS SETTING ORGANIZATIONS AND THE AVAILABILITY OF CURRENT, TECHNICALLY ACCURATE PRODUCT PERFORMANCE AND SAFETY STANDARDS

Voluntary product and safety standards and codes have been an integral part of the American economy for over a hundred years.[19] These standards are technical documents covering the essential safety and performance characteristics of a particular class of products. Standards such as those developed and maintained by NFPA represent the distillation of currently available technical information concerning the characteristics of the product. The utility of a standard is that it provides a yardstick for reliable judgments concerning a product's characteristics and performance vis-a-vis similar products.

Based on their proven reliability, these standards are adopted into state, county and municipal ordinances, regulations and building codes.[20] Many segments of business and industry rely upon these standards to make informed decisions regarding product characteristics and suitability.

The National Bureau of Standards has identified over 400 educational, scientific, technical or other non-profit organizations that are involved in developing product and safety standards. These organizations range from organizations, such

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[19] ASME was founded in 1880, NFPA was founded in 1896.

[20] In recognition of their importance the federal government has adopted a strong federal policy of encouraging and fostering private organizations to develop and maintain product safety and performance standards which is embodied in Office of Management and Budget Circular No. A-119, 45 Fed. Reg. 4326 (January 21, 1980). The circular specifically encourages the participation by government employees as volunteers on standards writing technical committees. The circular also encourages executive branch agencies to rely upon these voluntary product standards for procurement and regulatory purposes, whenever appropriate. The circular states: "Federal participation in the standards-related activities of these voluntary bodies provides incentives and opportunities to establish standards to serve national needs." OMB Circular No. A-119, at 4326.

as NFPA, who develops and maintains standards for a broad spectrum of fire safety and protection needs, to organizations which develop and maintain standards for a single product or category of products.[21]

Voluntary standards organizations serve the public interest channeling billions of dollars worth of volunteer manpower and expertise to the public good. Through the efforts of these organizations the quality of life is enhanced by greater availability of information on product safety and product performance. These organizations must rely upon thousands of individual volunteers to donate their time and expertise to serve on standards technical committees.[22]

The liability standard adopted by the decision below confers the status of insurer for all acts of their volunteer committee members upon these non-profit organizations. The loosely defined concept of "apparent authority" creates innumerable potential plaintiff's actions. Such liability will attach even where, as on the present facts, the volunteers act solely to benefit a third party and deceive the standards organization to benefit themselves and such third party.

The panel's proferred solution of additional review procedures is unworkable. It is extremely unlikely that additional review procedures, no matter how well conceived, will effectively combat the rare situation where volunteers on a committee actively conspire to deceive the standards organization to benefit their employer. The inherent delays and additional procedures will discourage many volunteers from continued service on such committees.

Without exception the major standards developing organizations, such as ASME and NFPA, rely upon committees comprised of volunteers to develop, maintain, and interpret product performance and safety standards. The efforts of these volunteers and knowledge and expertise they possess is vital to the effective functioning of the voluntary standards process.

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[21] For example, the Association of Home Appliance Manufacturers and the Tile Council of America.

[22] NFPA currently has 2,400 such volunteers, ASME has more than ten thousand.

Inasmuch as standards are technical documents, requests for interpretation or informal guidance are routinely received and processed. This interface between the standards organizations and those who utilize and rely upon their standards is ordinarily handled by the volunteers on the relevant technical committee. Responses to these requests provide valuable and often essential information to prospective product users. The interpretation process was supervised by ASME in a reasonable fashion under applicable ASME procedures.[23] ASME handles between 20,000 and 30,000 inquiries under these procedures annually.

The decision below betrays a fundamental misconception of the nature of the April 29, 1971 letter. The process of responding to requests for interpretation, clarification, or guidance concerning the technical requirements or language of a performance or safety standard must be distinguished from the procedures for certifying that a specific product complies with the relevant standards. This formal certification process is routinely handled by an independent body such as a testing laboratory, rather than by the standards body or an affiliated organization. The letter of April 29, 1971 resulted from a request for guidance concerning §HG-605 of the Boiler and Pressure Vessel Code,[24] *not* from a request as to whether Hydrolevel's product either was or could be certified as complying with the low-water fuel cut-off standard.

The decision below does not take account of this crucial distinction. The panel states:

> Absent some internal review procedures, no individual should be empowered to rule dispositively on the

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[23] The inquiry letter from M&M was, in accordance with official ASME procedures, referred by the staff secretary of the Boiler and Pressure Vessel Committee to Hardin, the Chairman of the subcommittee responsible for § HG-605 of the Boiler and Pressure Vessel Code. Hardin drafted a reply to the abstract technical inquiry posited by M&M's letter. This draft was reviewed by the Chairman and Vice-Chairman of the full Boiler and Pressure Vessel Committee. Only then was the April 29, 1971 reply letter issued as an unofficial communication on the issues raised by M&M's inquiry letter. See ASME's Petition for certiorari at 5.

[24] Based upon their knowledge of the relevant ASME procedures for processing interpretative requests, James and Hardin were able to circumvent and subvert this process to further the business interests of M&M and Hartford.

> fitness of a competitor's product. When an organization has placed a person in a position to do what Hardin did, without check or supervision, it must bear the consequences. 635 F.2d 118, at 126 (1980).

Contrary to the panel's suggestion ASME was neither negligent nor otherwise culpable based on the issuance of the April 29, 1971 letter. While the second paragraph of the letter is somewhat of a nonsequitur, it is a technically correct statement based upon the positioning of low-water fuel cut-off probe which is assumed in the inquiry letter. The damages, if any, suffered by Hydrolevel flow from the misrepresentations made by M&M and its salesman concerning the content and import of the letter. The panel erroneously assumes that closer supervision over ten thousand ASME volunteers could have precluded the issuance of the April 29, 1971 letter and the subsequent misrepresentation by M&M and its employees and salesmen. 635 F.2d 118, 126 (1980).

Absent some credible reason to suspect that the original request was contrived or without knowledge of the complicity ASME volunteers on the relevant subcommittee, no set of procedural safeguards would have aborted the conspirators' scheme to deceive ASME.

If left undisturbed the decision below will have a severe adverse impact on the ability of all standards developing organizations to recruit highly qualified volunteers to staff their technical committees. The additional commitment of time and resources to install additional procedures and litigate potential claims under the newly espoused "apparent authority" or "unintentional participation" theory will have no offsetting practical benefits. The prohibitions of §1 and §2 of the Sherman Act were never intended to reach unintentional conduct. *Accord, United States v. Aluminum Co. of America* 148 F.2d 416, 429 (2nd Cir. 1945). This Court should reverse the decision below and return the determination of antitrust liability to its proper moorings.

CONCLUSION

The decision of the Second Circuit should be reversed and the complaint dismissed.

Respectfully submitted,

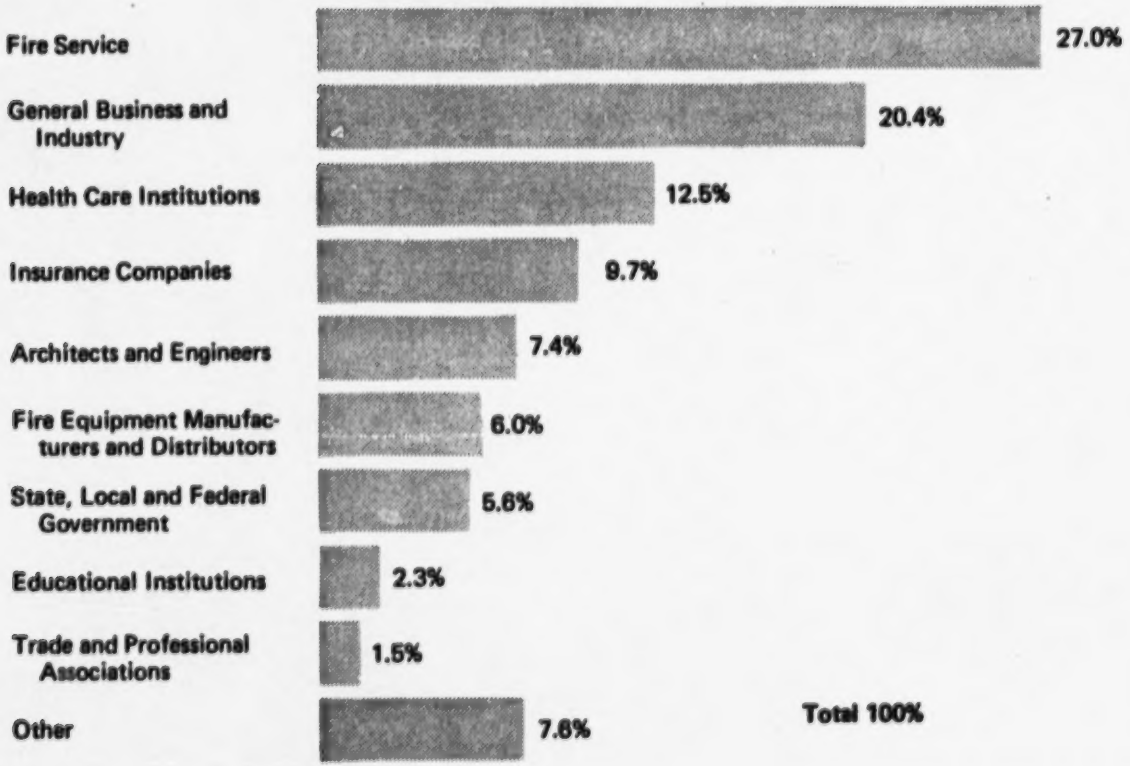
DANIEL J. PILIERO II
General Counsel
National Fire Protection
Association
WEBSTER, CHAMBERLAIN & BEAN
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 785-9500

Of Counsel:

MYRREL C. HENDRICKS, JR.
WEBSTER, CHAMBERLAIN & BEAN
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 785-9500

APPENDIX I

NFPA's MEMBERSHIP COMPOSITION



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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

STEPHEN M. SHAPIRO
Deputy Solicitor General

BARRY GROSSMAN
MARK C. DEL BIANCO
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ERNEST J. ISENSTADT
Acting General Counsel
Federal Trade Commission
Washington, D.C. 20580

QUESTION PRESENTED

Whether petitioner is responsible for antitrust violations committed by its agents acting within the scope of both their actual and their apparent authority.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1765

AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., PETITIONER

v.

HYDROLEVEL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States, which has primary responsibility for enforcing the federal antitrust laws, has a substantial interest in protecting the economy against anticompetitive practices carried on by incorporated and unincorporated entities acting through their officers, employees, and other agents. The government's ability to obtain effective injunctive relief, preventive administrative remedies, civil damages, and criminal fines from artificial entities depends on a continued recognition of traditional principles of *respondeat superior* in antitrust cases. See 15 U.S.C. 1, 2, 15a, 24, 25, 45(b), 46(g).

STATEMENT

The parties to this proceeding

1. Petitioner American Society of Mechanical Engineers, Inc. (ASME) is a technical and scientific association, organized in the form of a nonprofit corporation under the laws of New York (Pet. App. A-3; C.A. App.

675).[1] ASME has more than 90,000 members drawn from all fields of mechanical engineering. It has an annual operating budget of more than $12,000,000, derived from dues and sales of its publications. ASME conducts its affairs through a full-time staff as well as certain members who receive appointments to its committees (Pet. App. A-3).

Since its formation, ASME has promulgated Codes prescribing standards in numerous areas of engineering and commercial concern. As ASME notes in its brief in this Court (Br. 2), its various Codes have been "incorporated by reference" into the rules of federal regulatory bodies and the legislation of "most states, major cities, and all of the provinces of Canada." Accordingly, ASME's Codes have great influence in the marketplace and directly affect the ability of a company to market a product falling within the coverage of the Codes (Pet. App. A-3; C.A. App. 232-234, 422-423, 474-476, 730-731).

ASME operates pursuant to a constitution that sets forth its corporate purposes and authority (C.A. App. 678). The governing body of ASME is known as the Council. In 1911, the Council established a "Boiler and Pressure Vessel Committee" (*id.* at 681; A. Exh. V. 173-174). At that time, the Boiler and Pressure Vessel Committee received an express delegation of authority from the Council to "supervise the activities of the Society in connection with the 'ASME Boiler and Pressure Vessel Code' including the formulation, revision and interpretation of this Code" (A. Exh. V. 174; C.A. App. 681-682, 878-879).[2]

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[1] "C.A. App." refers to the joint appendix in the court of appeals. "H. Exh. V." refers to the exhibit volumes filed in the court of appeals by respondent Hydrolevel Corporation. "A. Exh. V." refers to the exhibit volumes filed in the court of appeals by petitioner ASME. "J. App." refers to the Joint Appendix in this Court.

[2] The Boiler and Pressure Vessel Committee thus received "express corporate authority" to interpret the Boiler and Pressure Vessel Code and to act on behalf of the governing Council of ASME with respect to the Code (J. App. 120).

The regulations of the Boiler and Pressure Vessel Committee, in turn, expressly authorize the Committee to delegate certain functions to Subcommittees "needed to accomplish its objectives" (A. Exh. V. 180). Subcommittees perform their appointed duties and exercise their responsibilities on a continuing basis (*id.* at 181; C.A. App. 881). Among other responsibilities, Subcommittees respond to public "inquiries" about the proper interpretation of the Boiler and Pressure Vessel Code following referral of such inquiries from the Secretary of the Boiler and Pressure Vessel Committee (A. Exh. V. 184). If an inquiry "can be answered by direct reference to the [Boiler and Pressure Vessel] Code" (*ibid.*), the Chairman of the relevant Subcommittee is authorized to prepare a draft response to be sent to the inquiring party by the Secretary of the Boiler and Pressure Vessel Committee (*ibid.*; C.A. App. 903-907).

ASME's regulations categorize such responses as "unofficial" (A. Exh. V. 184). However, "unofficial" responses are written on formal ASME stationery, display the title of ASME and its Boiler and Pressure Vessel Committee, list all members of the Committee, bear the signature of the Secretary of the Committee, and purport to embody the views of the "Chairman of the concerned Subcommittee" on the "intent" of the Code (see C.A. App. 79). As the Secretary of the Boiler and Pressure Vessel Committee acknowledged, such responses from ASME have "the equivalent of official weight," and any reader of such a response would regard it as "official" (J. App. 125-126). The term "unofficial," as applied to such responses, is merely a matter of internal usage (*ibid.*).

Responding to public inquiries concerning the intent and application of ASME Codes is one of the organization's central functions (C.A. App. 646-649). Because receiving and responding to inquiries is instrumental in updating the Codes, ASME is "very much interested in learning from the people who may be having problems with the code[s]" and welcomes "this flow of inquiries" (*id.* at 655). Thus, "[i]t is through these inquiries being

fed to the committee that we keep the code[s] current with the safety needs and the technical * * * advances" (*id.* at 656, 1109).

2. Respondent Hydrolevel Corporation ("Hydrolevel") was organized in 1965 to develop and manufacture a "probe-type" fuel cut-off control for boilers. Hydrolevel's control was designed to cut off fuel supplied to boilers when their water ebbed to a dangerously low level (Pet. App. A-4). In contrast to existing cut-off devices, the newly-developed Hydrolevel control operated without moving parts through a probe device installed within the boiler. To prevent premature fuel cut offs resulting from surging and bubbling of water inside the boiler, the Hydrolevel control also incorporated a time delay element that allowed fuel to continue to flow for a brief period after the water fell below the level of the probe (*id.* at A-5).

Hydrolevel's principal competitor in the market for low-water fuel cut-off devices was McDonnell & Miller ("M & M"), the nation's leading manufacturer of such devices (Pet. App. A-4). M & M traditionally maintained 70%-85% of the national market in fuel cut-off devices (*ibid.*; H. Exh. V. 632, 651). The product manufactured by M & M depended on a "float" type mechanism. When the water in a boiler with a float mechanism sinks to a critical level, the change in position of the float trips an electronic switch connected to the float and cuts off the boiler's fuel (Pet. App. A-4).

Both Hydrolevel and its competitor, M & M, manufactured boiler components subject to the standards of the ASME Boiler and Pressure Vessel Code. Accordingly, compliance with the requirements of the Code was essential to their commercial success.[3] Section IV of the Code prescribes standards for boiler components, including low-water fuel cut-off devices. To ensure that such cut-off devices operate before the water in a boiler falls

[3] As ASME notes in its brief in this Court (Br. 5), the Boiler and Pressure Vessel Code "has been adopted in 46 states and all but one Canadian province."

to a dangerously low level, Paragraph HG-605 of Section IV of the Code requires that each boiler have " 'an automatic low-water fuel cut-off so located as to automatically cut off the fuel supply when the surface of the water falls to the lowest visible part of the water-gauge glass' " attached to the outside of the boiler (Pet. App. A-4; A. Exh. V. 2).

M & M enjoyed a special advantage in assuring that its product complied with ASME's Code requirements and in competing against other companies that attempted to manufacture cut-off devices. John W. James, the Vice-President in charge of research at M & M, also served as the Vice-Chairman of the Section IV Subcommittee of ASME which drafted, revised, and interpreted Section IV of the Boiler and Pressure Vessel Code (Pet. App. A-5). James served for many years as Chairman or Vice-Chairman of the Section IV Subcommittee, and took a major part in revising the Code provisions governing boiler controls (C.A. App. 853). James' connection with ASME made him a valuable member of the M & M management team and he was compensated by M & M while performing ASME's work (J. App. 110). In a confidential memorandum, M & M emphasized James' value to the company stemming from his joint role at M & M and ASME (J. App. 86):

> John has been a senior management employee of M & M for over 25 years. * * * A major reason for the continued success at M & M is a result of his efforts and skill in influencing the various code making bodies to "legislate" in favor of M & M products. This has been a planned strategy for the business under E.N. McDonnell and carried out with considerable success as evidenced by the M & M market penetration of 70 plus %.

The conspiracy to prevent Hydrolevel from marketing its product

In early 1971, a major purchaser of low-water fuel cut-off controls (Brooklyn Union Gas Co.) decided to switch to Hydrolevel's probe-type device after years of

purchasing M & M's product (Pet. App. A-5). Brooklyn Union communicated that decision to M & M (H. Exh. V. 301-308). M & M then determined, in the words of the court of appeals, "to use ASME code interpretation procedures to stifle Hydrolevel's competition" (Pet. App. A-5).

To counter Hydrolevel's threat, M & M arranged two strategy meetings in Chicago, Illinois. Those meetings were attended by John W. James (Vice-Chairman of the ASME Section IV Subcommittee and Vice-President in charge of research at M & M), T.R. Hardin (Chairman of the ASME Section IV Subcommittee and Executive Vice-President of Hartford Steam Boiler Inspection and Insurance Company), James Solon (President of M & M), and Eugene Mitchell (Vice President of M & M) (Pet. App. A-5).[4] During the course of these meetings, the participants decided to send a letter to ASME's Boiler and Pressure Vessel Committee inquiring whether a cut-off with a time delay feature, of the kind manufactured by Hydrolevel, would comply with Paragraph HG-605 of the Code (*id.* at A-5 to A-6).

James and Hardin drafted a letter of inquiry to ASME's Boiler and Pressure Vessel Committee which they expected to produce a negative answer (Pet. App. A-6). They also discussed the substance of the response that ASME would send back to M & M (H. Exh. V. 236-237, 247-259).[5] Mitchell signed the letter on behalf of M & M, and sent it to W. Bradford Hoyt, the Secretary of the Committee. The letter inquired specifically whether Paragraph HG-605 of the Code permitted a low-

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[4] International Telephone and Telegraph recently had acquired a controlling interest in Hartford, the company that employed Hardin. Shortly thereafter, ITT entered into negotiations to acquire M & M, which employed James, Solon and Mitchell. ITT completed its acquisition of M & M later in the year. Pet. App. A-5 n.2.

[5] James later destroyed the correspondence between himself and Hardin on this subject because he was "scared" that the correspondence would come to light (H. Exh. V. 247-252, 257-259, 329-339; J. App. 105-107).

water fuel cut-off device to "incorporate a time-delay feature" (J.A. 62).

When Hoyt received this inquiry, he processed it according to the regulations of the Boiler and Pressure Vessel Committee (Pet. App. A-6). As ASME acknowledges in its brief in this Court (Br. 8), the Boiler and Pressure Vessel Committee was "[f]ollowing standard procedures" in all respects in processing the inquiry. Those procedures allowed Hoyt to refer the inquiry to Hardin—the "Chairman of the appropriate Subcommittee"—to prepare a draft response (C.A. App. 864-867, 870, 878-879, 881; J. App. 121-124). Hardin treated the inquiry as a simple request for a construction of the Code and, accordingly, as requiring only his own attention (Pet. App. A-6 to A-7). This left Hardin with essentially "unsupervised control" over ASME's response—a response to an inquiry that he himself had drafted (*id.* at A-6).

Hardin prepared the response and sent it to Hoyt (J. App. 63). On April 29, 1971, Hoyt incorporated the response in a letter that bore the title and logo of ASME and listed all members of the Boiler and Pressure Vessel Committee (see C.A. App. 79; J. App. 64). Hoyt signed the letter in his capacity as Secretary of the Committee and purported to express the views of the "Chairman of the concerned Subcommittee" on the "intent of Par. HG-605(a)" of the ASME Boiler and Pressure Vessel Code (*ibid.*). Hoyt did not attempt to check the accuracy of the contents of the letter before mailing it (J. App. 124-126).

The first paragraph of ASME's letter referred to the requirements of Paragraph HG-605(a) of the Code and stressed the need for a positive cut-off mechanism. However, the second paragraph of the letter stated the following (J. App. 64):

> If a time delay feature were incorporated in a low-water fuel cut-off, there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period.

The second paragraph of ASME's letter misdescribed the requirements of the code and had the effect—intended by Hardin, James, Solon and Mitchell—of branding as hazardous all cut-off devices incorporating a time delay feature. As the court of appeals noted, "[t]he second paragraph of this letter does not follow from the first" (Pet. App. A-7), and "draws * * * [a] misleading conclusion" (*id.* at A-8).[6] The second paragraph condemned Hydrolevel's product even though it could be installed substantially above the minimum low water level in boilers and effectively shut off their fuel supply before the water fell to a dangerous level (*ibid.*). Thus, ASME's letter "intentionally misinterpreted the Code so as to prevent Hydrolevel from selling its product" (Pet. App. A-12).[7]

M & M quickly made use of the misleading letter from ASME and diverted Hydrolevel's potential customers (Pet. App. A-8; J. App. 90, 92; C.A. App. 232-233, 403, 474-476). M & M instructed its sales force, which was armed with the letter, to inform potential customers that the Hydrolevel product is "very definitely * * * against the ASME Code" (H. Exh. V. 373-374). As ASME fully recognized, "if anyone saw that letter in the trade they

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[6] The misleading character of this letter was recognized later by some of ASME's highest officials (see J. App. 82-84).

[7] Despite the adverse verdict of the jury in this case and the conclusion of the court of appeals that ASME's April 29, 1971, letter "intentionally misinterpreted the Code" (Pet. App. A-12), ASME persists in characterizing its misleading letter as "nothing more than a straightforward interpretation of the B-PV Code itself" (Br. 9). Before the jury, ASME presented witnesses who testified that, in rendering the interpretation, ASME was "only interested in making certain that the code is properly administered" (C.A. App. 649), and that the letter was a "reasonable and appropriate interpretation[] of the intent of the code" (*id.* at 930). In summation, defense counsel argued that there was nothing "wrong" with the ASME response to M & M's inquiry (*id.* at 1103-1109), and that the letter was not "rigged" (*id.* at 1106). Counsel also argued to the jury that the rendering of such interpretations was "[o]ne of ASME's functions," and that ASME "welcome[s]" the opportunity to provide answers to inquiries to assist it in developing the Code (*id.* at 1109-1110).

would view it as [having] the equivalent of official weight" (J. App. 126). M & M thus effectively utilized the misleading letter procured from ASME to stifle the competitive threat posed by Hydrolevel.

Nine months after ASME released the misleading letter, Hydrolevel learned of its existence and requested a copy from the Secretary of Subcommittee IV (J. App. 65). ASME surrendered a redacted copy of the letter but refused to furnish a complete copy or to disclose the identity of the party who requested the letter (Pet. App. A-8 to A-9; J. App. 115-116). Hydrolevel complained that the letter was false and asserted that it unfairly disparaged its product. Hydrolevel also demanded that ASME send a retraction to every person who received a copy of the letter (*id.* at A-9; J. App. 68-73). Instead of promptly publishing the requested retraction or forwarding it to Hydrolevel's potential customers, ASME sent an ambiguous response to Hydrolevel more than two months later (J. App. 84; compare *id.* at 99-100). That response, which James helped to draft (H. Exh. V. 240-244), "confirmed the intent" of the original letter but also stated that "there is no intent in Section IV to prohibit the use of low water fuel cutoffs having time delays * * *" (J. App. 84).

Despite this communication from ASME, Hydrolevel's product continued to meet substantial market resistance (J. App. 117). Hydrolevel later went out of business and sold the assets of the company (excluding the present cause of action) for $86,000 salvage value (Pet. App. A-11).

Proceedings in the district court

Hydrolevel brought suit against ASME, M & M, and Hartford Steam Boiler Inspection and Insurance Company in the United States District Court for the Eastern District of New York, alleging that the defendants had conspired to restrain trade and to monopolize the market for low-water fuel cut-off devices, in violation of Sections

1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2.[8] Much of the evidence of conspiracy, summarized above, focused on the activities of James (Vice-Chairman of ASME's Section IV Subcommittee and Vice-President at M & M) and Hardin (Chairman of ASME's Section IV Subcommittee and Executive Vice-President of Hartford).

At the conclusion of trial, the district court rendered a charge to the jury that, in the words of the court, was "essentially a defendant's charge" (C.A. App. 996). The court used "the defendant's instructions" (*id.* at 964), and melded them with its own standard charge (*ibid.*).[9] The Court repeatedly stressed that ASME could not be held liable unless it "intentionally joined the conspiracy" (J. App. 45) through "a meeting of the minds in an unlawful arrangement" (*id.* at 46). Thus, Hydrolevel was required to prove that "ASME knowingly participated in the unlawful plan, with the intent to advance or further some object or purpose of the conspiracy" (*ibid.*). The court also instructed the jury that "deliberate indifference, recklessness, * * * or stupidity or insensitivity" are not equivalent to willful adherence to a conspiracy (*id.* at 52).

The court further charged that, to establish a conspiracy to violate Section 1 of the Sherman Act, Hydrolevel must prove a scheme to inflict an unreasonable restraint of trade, which was "intended or * * * calculated to prejudice the public interest" (J. App. 51). To establish a conspiracy to monopolize, Hydrolevel must prove an agreement to dominate the low-water fuel cut-off industry, as well as an "intent to monopolize" that commerce, overt acts in furtherance of the scheme, and proximate injury to Hydrolevel (*id.* at 51). The court repeatedly emphasized that Hydrolevel must prove "that ASME intended to injure or destroy competition * * *"

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[8] M & M and Hartford entered into settlements with Hydrolevel, leaving ASME to stand trial alone.

[9] The court added that "[t]he only instruction that I've taken from the plaintiff is the one dealing with the definition of a monopoly" (C.A. App. 964).

(*id.* at 52), and that, if ASME were "motivated solely by legitimate aims in this particular case," the jury must find against Hydrolevel (*ibid.*).

On the issue of *respondeat superior*, the district court adopted the substance of the charge proposed by ASME (J. App. 60-61). Thus, the court charged that ASME could be found to be a conspirator only through the actions of its officers or agents "acting within the scope of their employment or authority, and on behalf of and for the benefit of the corporation * * *" (J. App. 47). The court added that (*id.* at 48):

> Even if one or more of the members of the staff or of a committee or subcommittee of the defendant joined the conspiracy, that would not necessarily constitute a joining by the defendant. For the individual or individuals might be on an escapade or a frolic * * * of his own. They might even be keeping it secret from others, in order to prevent those in authority to scotch the scheme * * *.
>
> The participation by staff, officers or committees and subcommittees must have been sufficiently pervasive to make it fair and reasonable to say that they were acting on behalf of the defendant * * *.

Finally, the court charged the jury that (J. App. 49):

> If the officers or agents act on behalf of interests adverse to the corporation or acted for their own economic benefit or the benefit of another person or corporation, and this action was not ratified or adopted by the defendant, their misconduct cannot be considered that of the corporation with which they are associated.

Following the delivery of this charge, ASME stated to the court that the charge was "[s]atisfactory to us" (C.A. App. 1192; J. App. 58).[10] With ASME's approval, the entire charge, as transcribed by the reporter, was given

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[10] ASME's counsel objected only to the court's failure to give an instruction relating to certain remarks by Hydrolevel's counsel during trial (*ibid.*). That objection has no bearing on the issues now before this Court.

to the jury during its deliberations (C.A. App. 1195, 1206). After completing its deliberations, the jury returned a verdict in favor of Hydrolevel, finding ASME liable for a violation of the antitrust laws which caused injury to Hydrolevel (*id.* at 1207). Following a separate trial on the issue of damages, the jury found that Hydrolevel had suffered business losses as a result of the antitrust conspiracy which, when reduced to reflect prior settlements and trebled by the court, amounted to $7.5 million (Pet. App. A-11).

The decision of the court of appeals

The court of appeals affirmed the jury's verdict on the issue of liability (Pet. App. A-12 to A-19), but reversed the damage award as excessive and remanded for a new trial on the damage issue (*id.* at A-21 to A-26). On the issue of liability, the court explained that, given "the effect and intent of the April 29 interpretive letter * * *, the restraint was surely unreasonable: it intentionally misinterpreted the Code so as to prevent Hydrolevel from selling its product" (*id.* at A-12). The court of appeals also affirmed the jury's determination that ASME was responsible for the misconduct of its agents, although it applied a principle of *respondeat superior* different from that embodied in the district court's charge.

The court of appeals noted that the district court's charge required the jury to find either that ASME's agents acted to benefit ASME, or that ASME ratified the actions of its agents, before imposing liability (Pet. App. A-12 to A-13, A-19). The court of appeals saw no need to examine the sufficiency of the evidence under that instruction, however, because it concluded that the district court's charge on *respondeat superior* "was more favorable to the defendant than the law requires" (*id.* at A-19). In the court of appeals' view, a restraint of trade imposed by "a willful and knowing misrepresentation" of the requirements of the ASME code, made possible through use of the facilities, procedures and commercial reputation of ASME, should render ASME liable pursuant to the doctrine of "apparent authority" regardless of the motives

of its agents and without ratification (*id.* at A-13 to A-15). The court explained that, when "an organization has placed a person in a position to do what Hardin did, without any check or supervision, it must bear the consequences" (*id.* at A-16). The court added (*id.* at A-14) that imposition of liability on ASME "will induce greater care to prevent misconduct by agents occupying especially sensitive or responsible positions that invite reliance—a consideration of great importance in cases such as this where misuse of quasi-official standards and codes can so easily injury competitors."

INTRODUCTION AND SUMMARY OF ARGUMENT

ASME argues that the decision of the court of appeals must be reversed because the court misconceived the doctrine of *respondeat superior*. However, the court of appeals upheld the jury's verdict imposing liability on ASME. And the trial judge instructed the jury on the issue of *respondeat superior* in the very terms proposed by ASME. ASME did not object to the trial judge's charge to the jury and did not challenge that charge on appeal. Accordingly, even if there were merit to ASME's contention that the court of appeals erred in its discussion of *respondeat superior*, there would be no basis for disturbing the jury's verdict finding ASME to be responsible for the wrongs of its agents.

Not only did ASME receive the charge that it requested, but that charge was "more favorable" to ASME than the law requires (Pet. App. A-19). The district court instructed the jury that, unless ratified by ASME, the acts of its agents should not be imputed to it if those acts were intended to benefit another person (J. App. 49). However, well-established principles of agency law provide that the acts of an agent, performed within the scope of his actual authority (*New York Central & Hudson River R.R.* v. *United States*, 212 U.S. 481, 494 (1909)), are imputable to the principal even though they are intended to benefit another person if

those acts also are intended, even in part, to benefit the principal (*Restatement (Second) of Agency* § 236 (1958)). Moreover, in cases such as the present one, in which the principal lends its agents the facilities and apparent authority needed to inflict the injury complained of, the principal is liable even if the agents intend *solely* to benefit themselves or a third party (*Gleason* v. *Seaboard Air Line Ry.*, 278 U.S. 349, 355-357 (1929)).

ASME's contrary view is that code-making bodies may plead ignorance and thereby immunize themselves from responsibility for actions of agents who invidiously exercise code-interpretation powers to the detriment of disfavored competitors. Judicial acceptance of such a plea would encourage code-making organizations to *minimize* their awareness and supervision of the activities of their own personnel. By contrast, if a code-making body is made to answer for restraints of trade inflicted by agents exercising delegated powers, "pressure [will be] brought on those who [control] the entity to see to it that their agents abide by the law" (*United States* v. *A & P Trucking Co.*, 358 U.S. 121, 126 (1958)).

This incentive to comply with the law is particularly important in the case of an entity, such as ASME, which serves as an "extra-governmental agency" and effectively "prescribes rules for the regulation and restraint of interstate commerce * * *" (*Fashion Originators' Guild* v. *FTC*, 312 U.S. 457, 465 (1941)). ASME's Codes have been incorporated by reference in the laws of most states in the nation. And, as the facts in this case demonstrate, those Codes can effectively block entry into the marketplace by new competitors and new products. Application of the antitrust laws to conspiracies to "legislate" (J. App. 86) against the products of disfavored competitors through misuse of the facilities of code-making bodies will encourage code-making bodies to guard against such improper practices.

ARGUMENT

ASME IS ACCOUNTABLE TO HYDROLEVEL FOR ANTITRUST INJURIES RESULTING FROM THE CONDUCT OF ASME'S AGENTS ACTING WITHIN THE SCOPE OF EITHER THEIR ACTUAL OR THEIR APPARENT AUTHORITY

I. Because The Jury Found ASME Liable Under A Charge To Which ASME Offered No Objection, The Jury's Finding Of Liability Should Be Affirmed

As the district court correctly observed, its charge was "essentially a defendant's charge," based in substantial part on proposed instructions tendered by ASME (see pages 10-11, *supra*). The court's charge on *respondeat superior* closely corresponded with the charge proposed by ASME (see J. App. 60-61). Rather than objecting to the charge, ASME declared that the charge was "[s]atisfactory" (J. App. 58). And it acknowledged in the court of appeals that the charge "was generally accurate" (C.A. Br. 18 n.*). Indeed, the charge given to the jury in this case mirrors the charge that ASME contends, in its brief in this Court, should be given in antitrust cases.[11]

Because ASME acquiesced in the charge given to the jury (see Fed. R. Civ. P. 51), and because it failed to challenge the validity of that charge in the court of appeals (see *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)), ASME has no basis for complaining in this Court that liability was imposed on it pursuant to erroneous legal standards. Accordingly, even if there were merit to ASME's assertion (Br. 21) that the court of appeals erred in its discussion of the doctrine of *respondeat superior*, the court of appeals' judgment

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[11] ASME argues (Br. 47) that Hydrolevel should have been required to prove "either that James and Hardin intended to benefit ASME or that ASME knowingly acquiesced in or ratified their acts." That is precisely what the district court charged the jury (J. App. 47-49, 52-53).

upholding the jury's verdict on the issue of liability should be affirmed.[12]

II. The District Court's Charge To The Jury Was More Favorable To ASME Than The Law Requires

Although the district court's imposition of liability may be affirmed on the ground that the charge rendered to the jury was not objected to by ASME, that charge should not receive the endorsement of this Court. As the court of appeals correctly observed (Pet. App. A-19), the district court's charge "was more favorable to the defendant than the law requires." If such a charge were adopted as a pattern or standard in the federal district courts, it would interfere seriously with the effective enforcement of the antitrust laws, not only by private plaintiffs in treble damage actions, but also by the United States in injunctive, damage, and criminal proceedings. As we demonstrate below, corporations are responsible for torts of their agents committed within the scope of their actual authority even if the agents intend primarily to benefit themselves or a third party.

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[12] ASME did not raise among the questions presented in its petition for certiorari the question whether the evidence was sufficient to sustain the jury's verdict under the charge delivered by the district court. And, as this Court frequently has stated, it does not "grant * * * certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). In any event, the evidence was sufficient for the jury to impose liability on ASME under the district court's charge. The evidence summarized above (see pages 2-9, *supra*) showed that Hardin acted (in collaboration with James) within the scope of his expressly delegated authority in rendering the challenged interpretation of the ASME Code. See *Restatement (Second) of Agency* § 228 (1958). Moreover, as the district court concluded, the evidence introduced in this case supported the inference that ASME ratified or affirmed the actions of Hardin and James (J. App. 35-42; see also *Restatement (Second) of Agency* §§ 82, 93 and 94 (1958)). The jury also could have found that Hardin and James acted for the "benefit" of ASME since ASME's own witnesses repeatedly testified that the challenged actions were taken pursuant to established ASME procedures and were a necessary part of ASME's efforts to interpret and update the Code (see pages 3-4, 7-8 & note 7, *supra*).

Moreover, even if agents intend *solely* to benefit themselves or a third party, a corporation is responsible for torts of those agents if the corporation affords them the facilities and apparent authority needed to inflict the injury.

A. *Corporations are liable for restraints of trade, inflicted by agents acting within the scope of their actual authority, even if the agents act in part for the purpose of benefiting themselves or third parties*

1. The prohibitions of the Sherman Act apply to "[e]very person" (15 U.S.C. 1, 2), including "corporations" and "associations" (15 U.S.C. 7).[13] Corporations such as ASME, however, can act only through their officers, employees and agents. As Judge Hook observed long ago, "[w]hile a corporation has no brain to contrive, no tongue to deceive, and no hands with which to strike, it employs in its service the brains and tongues and hands of others, and as it can only operate through natural persons, there is * * * a correlative responsibility for the acts of those persons in the course of the corporate business and of their employment, and for any malicious and evil intent with which such acts are attended." *Stewart* v. *Wright*, 147 F. 321, 327 (8th Cir. 1906).

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[13] There is no question that the Sherman Act applies to entities such as ASME. See *Radiant Burners, Inc.* v. *Peoples Gas Light Co.*, 364 U.S. 656 (1961) (upholding a Sherman Act complaint against the American Gas Association which allegedly had issued arbitrary standards to the detriment of a manufacturer of gas burners); *Associated Press* v. *United States*, 326 U.S. 1 (1945) (upholding a Sherman Act complaint against a nonprofit membership association); *American Medical Association* v. *United States*, 317 U.S. 519 (1943) (upholding a Sherman Act complaint against a voluntary medical association which prescribed ethical codes for doctors); see also *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 392 (1922); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 682 (1978). ASME itself previously has entered into an antitrust consent decree. See *United States* v. *American Society of Mechanical Engineers*, [1972] Trade Cas. (CCH) ¶ 74,029 (S.D.N.Y. 1972).

Thus, the law traditionally has recognized that "for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business, and of their employment, the corporation is responsible, as an individual is responsible, under similar circumstances." *Philadelphia, Wilmington & Baltimore R.R.* v. *Quigley*, 62 U.S. (21 How.) 202, 210 (1858). This fundamental principle of agency law applies in private treble damage actions under the Sherman Act, as in all other forms of corporate litigation. See *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 395 (1922) ("A corporation is responsible for the wrongs committed by its agents in the course of its business, and this principle is enforced against the contention that torts are *ultra vires* of the corporation").

So firmly is the rule of *respondeat superior* entrenched in the field of corporate litigation that even criminal derelictions, committed by corporate agents within the scope of their delegated responsibilities, are imputable to the corporation. See *New York Central & Hudson River R.R.* v. *United States*, 212 U.S. 481, 494 (1909):

> [T]he subject-matter of making and fixing rates was within the scope of the authority and employment of the agents of the company * * *. Thus clothed with authority, the agents were bound to respect the regulation of interstate commerce enacted by Congress * * *. Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.

In short, it is well settled that, "[w]hen it is sought to hold a corporation liable for a tort, it is no answer for it to say that its agent or servant was not expressly authorized to commit the wrongful act, nor even that such act was contrary to or in violation of the instructions or orders given by it to the offending agent or serv-

ant, nor that the injury resulted from willful or wanton wrongdoing on the part of its employees in the course of their employment." 10 W. Fletcher, *Cyclopedia of the Law of Private Corporations* 350 (rev. ed. 1978) (footnotes omitted); see also *United States* v. *Illinois Central R.R.*, 303 U.S. 239, 244 (1938); *United States* v. *A & P Trucking Co.*, 358 U.S. 121, 126 (1958).[14]

2. The law of agency imputes liability to a corporation, based on the torts of its agents and employees acting within the scope of their actual authority, in any case in which the agents intend in part to serve the purpose of the corporation. This is true even if the agents also intend to serve their own selfish interest or the interest of a third party. See *Restatement (Second) of Agency* §§ 216, 236 (1958). Section 236 of the *Restatement* provides:

> Conduct may be within the scope of employment, although done in part to serve the purposes of the servant or of a third person.

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[14] It is irrelevant that "the higher executives of the corporation, * * * took the utmost care to lay down for the guidance of the subordinate employees procedures designed to assure compliance with the regulation" (*St. Johnsbury Trucking Co.* v. *United States*, 220 F.2d 393, 398 (1st Cir. 1955) (Magruder, C.J., concurring)). Liability may be based on the acts of agents with low rank in the corporation (*United States* v. *George F. Fish, Inc.*, 154 F.2d 798, 801 (2d Cir.), cert. denied, 328 U.S. 869 (1946)), whose activities are wholly "routine" in nature (*United States* v. *Armour & Co.*, 168 F.2d 342, 343-344 (3d Cir. 1948)). Liability is imputed even though the corporation claims that the misconduct is "to its detriment" (*Old Monastery Co.* v. *United States*, 147 F.2d 905, 908 (4th Cir.), cert. denied, 326 U.S. 734 (1945)), is "in contravention of written directions" (*Continental Baking Co.* v. *United States*, 281 F.2d 137, 150 (6th Cir. 1960)), is beyond the "knowledge" and consent of the corporation (*Zito* v. *United States*, 64 F.2d 772, 775 (7th Cir. 1933)), is "contrary to * * * instructions" (*Egan* v. *United States*, 137 F.2d 369, 379 (8th Cir. 1943)), or is beyond the scope of delegated authority because the agent has "no corporate power to commit such acts of bad faith" (*C.I.T. Corp.* v. *United States*, 150 F.2d 85, 89 (9th Cir. 1945)).

As Comment *a.* to Section 236 explains, liability may be imputed when the agent, although performing his principal's work, "is at the same time accomplishing his own objects or those of a third person which conflict with those of the master." Moreover, as Comment *b.* points out, "[t]he fact that the predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment." The principal is liable unless the act of the agent "is done with no intention to perform it as a part of or incident to a service on account of which he is employed." *Restatement (Second) of Agency* § 235 (1958).

The district court's instruction to the jury in the present case failed to take account of this basic principle of agency law. The court instructed the jury (Pet. App. A-13) that liability could not be imposed on ASME if its "officers or agents act[ed] on behalf of interests adverse to the corporation or acted for their own economic benefit or the benefit of another person or corporation * * *." As the authorities cited above clearly demonstrate, however, *respondeat superior* attaches to the torts of an agent acting within the scope of his assigned functions if the agent entertains even a subsidiary purpose to serve the objectives of his principal. It is immaterial that his "predominant" motive is to serve another party or his own interests.[15]

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[15] In the present case, Hardin, acting in collaboration with James, performed the very function that was delegated to him under ASME's constitution and regulations. The evidence also demonstrated that the interpretive function served the corporate purposes of ASME. See pages 2-4, 6-8 & note 7, *supra*. Thus, the jury reasonably could find that Hardin and James were acting, at least in part, on behalf of ASME. In these circumstances, it is immaterial that James and Hardin sought to advance the interests of M & M at the same time that they exercised their delegated authority. See *Restatement (Second) of Agency* § 235 (Comment *a.*) (1958): "If, therefore, the servant does * * * the kind of act which he is authorized to perform, * * * there is an inference that he is acting within the scope of employment."

When an agent, acting within the scope of his actual delegated authority, entertains even a partial purpose to benefit his principal, there is no need for "ratification" by the principal. In cases such as the present case, therefore, the rule announced in *United Mine Workers* v. *Coronado Coal Co.*, *supra*, 259 U.S. at 393-396, has no application. *Coronado* concluded that an International Union could not be held responsible for the tortious conduct of the members of one of its local organizations. The strike at issue in that case was called and financed solely by the local organization. Moreover, under the constitutions of both the International Union and the local organization, the strike was a matter of local responsibility only. In those circumstances, liability could not be imposed on the International Union because it had not authorized, participated in, or ratified the strike, and there was no substantial claim that it had lent "an appearance of authority" to the local organization. 259 U.S. at 395. In the present case, by contrast, the agents guilty of misconduct exercised authority expressly delegated to them by their principal, and performed the very kinds of acts they were assigned to perform. The principal therefore is liable even if the actions of its agents were motivated in part by a desire to benefit a third party and even if the principal never ratified those actions.[16]

B. *Corporations are liable for restraints of trade, inflicted by their agents acting within the scope of their apparent authority, even if the agents act solely for the purpose of benefiting themselves or third parties*

Even if an agent acts with the sole purpose of benefiting himself or a third party, the corporate principal is responsible for violations of the antitrust laws if the principal lends the agent the facilities and apparent authority needed to execute the restraint of trade. For this

[16] As previously noted, moreover, the district court, in denying ASME's motion for a directed verdict, held that reasonable jurors could find "ratification" or acquiescence by ASME in this case. See page 16 note 12, *supra*.

additional reason, the court of appeals correctly concluded (Pet. App. A-13 to A-19) that the district court's charge to the jury in this case, which required Hydrolevel to prove that ASME's agents intended to benefit ASME, was "more favorable to the defendant than the law requires" (*id.* at A-19).[17]

1. The evidence adduced by Hydrolevel clearly established that ASME, through its express delegation of authority to Hardin and James, placed in the hands of its agents the mechanism needed to issue an authoritative yet fatally deceptive disparagement of Hydrolevel's product. As Section 219(2)(d) of the *Restatement (Second) of Agency* (1958) provides, a principal is liable for the torts of its agent if the agent purports "to speak on behalf of the principal and there was reliance upon apparent authority, or [the agent] was aided in accomplishing the tort by the existence of the agency relation." Thus, a principal is liable for "defamation" if the agent has "apparent authority" to speak for the principal. *Id.* at §§ 247 and 254. As Comment *c.* to Section 247 explains, "one who appears to have authority to make statements for the employer gives to his statements the weight of the employer's reputation. For this reason, the liability of the master may be based upon apparent authority. The motive of the spokesman and the position he holds are therefore immaterial if the master has apparently designated him to speak." Accordingly, "intent to serve the master or other principal" is not "determinative." *Ibid.*

Similarly, "misrepresentations" causing financial injury render the principal liable if apparent authority exists. *Restatement (Second) of Agency* §§ 249, 257, 261, 262 and 265 (1958). Such liability may be imposed even

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[17] As discussed immediately above, the "actual authority" doctrine applies to the facts of this case even if ASME's agents had a partial purpose to benefit M & M. Nonetheless, we agree with the court of appeals that the "apparent authority" doctrine also applies in a case such as this. As we demonstrate below, the purpose of ASME's agents is not material in applying the apparent authority doctrine.

if the agent "acts wholly for his own purposes and hence is not acting in the scope of employment." Section 249, Comment *a*. Indeed, the principal is bound by the acts of an agent with apparent authority even though the agent "makes the misrepresentation from a motive other than that of serving the principal, or acts with a purpose of defrauding him." Section 257, Comment *d*.

Finally, and most pertinently, a principal is liable for "interference with business relations" inflicted by an agent if the agent acts within the scope of his "apparent authority." *Restatement (Second) of Agency* §§ 248 and 265 (1958). Once again, the agent binds the principal "irrespective of his motive." Section 248, Comment *b*.

In all of the instances cited above in which the principal is bound by the torts of an agent acting within the scope of his apparent authority, it is immaterial whether the harm is inflicted directly upon the plaintiff, or whether the harm befalls the plaintiff indirectly through deceit of third persons. Section 265 of the *Restatement (Second) of Agency*, Comment *a*., explains:

> The harm may also result from statements to third persons, as where one who, with the principal's knowledge, has acquired the reputation of being his spokesman, makes a speech which is defamatory of the plaintiff. * * * In the same way, the principal may be responsible for untrue statements which harm another in his business * * * or any other legally protected interest. In all of such situations, the motive of the apparent agent is immaterial unless known.

2. ASME attempts to convey the impression (Br. 21-35) that the foregoing principles of agency law, as codified in the *Restatement*, have no proper place in corporate litigation under the antitrust laws. In fact, however, these principles have been applied for many years in a wide variety of cases involving torts by corporate agents acting within the scope of their apparent authority.[18] These

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[18] "[T]reble-damages actions under the antitrust laws are analogous to common-law actions sounding in tort." *Texas Industries,*

principles apply with particular force under a federal statute such as the Sherman Act, which depends on effective deterrence of all persons participating in illegal restraints of trade. See pages 25-33, *infra*.[19]

The apparent authority principle adopted by the court of appeals in this case enjoys the sanction of Justice Stone's opinion for a unanimous Court in *Gleason* v. *Seaboard Air Line Ry.*, 278 U.S. 349, 355-357 (1929), which imposed vicarious liability on a corporation based on a fraud practiced by one of its lower level agents. This Court emphasized that liability for false statements of an agent "is unaffected by his secret purpose or motives." *Id.* at 356. The Court rejected the notion that the principal should escape liability for deceit because the agent acted "without the principal's knowledge or consent" and inflicted an injury "to which his own negligence has not contributed." *Ibid.* The Court added that "few doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own." 278 U.S. at 356.[20]

Inc. v. *Radcliff Materials, Inc.*, No. 79-1144 (May 26, 1981), slip op. 3-4. There is no reason why, therefore, the agency principles traditionally applied in corporate tort actions should not apply in antitrust suits such as this. See the authorities cited in note 20, *infra*, applying the apparent authority doctrine in a wide variety of common law and federal regulatory cases.

[19] *Truck Drivers' Local No. 421* v. *United States*, 128 F.2d 227, 235-236 (8th Cir. 1942), relied on by ASME (Br. 23), does not suggest a different result. In that criminal prosecution, the court of appeals declined to impute the actions of a division of a labor union to the whole union. The court relied on the insufficiency of the government's evidence and "the specific limitation which the record uncontradictedly shows * * * upon the authority of the milkmen's division to bind the union" (*id.* at 236). The court distinguished the case before it from cases where "the officers of the union had been performing the mere normal functions of their offices" (*ibid.*). In the present case, ASME's officers performed their expressly delegated functions and the misleading interpretation they disseminated bore all the indicia of a formal ruling of the association.

[20] When the principal holds out apparent authority by lending its reputation and facilities to the agent, imposition of vicarious

Indeed, application of the apparent authority doctrine to impose vicarious antitrust liability on corporations, notwithstanding the dishonest motivation of their agents, is consistent with the accepted principle that corporations are liable for antitrust violations of agents acting within the scope of their employment even if those agents act in contravention of the express orders, policies, and wishes of the company. See, *e.g.*, *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1004-1007 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973); *United States* v. *Cadillac Overall Supply Co.*, 568 F.2d 1078, 1090 (5th Cir.), cert. denied, 437 U.S. 903 (1978); *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204 (3d Cir. 1970), cert. denied, 401 U.S. 948 (1971).

III. Requiring ASME To Account For The Misconduct Of Its Agents, Who Exercised Expressly Delegated Power To Regulate The Competitive Process, Will Further The Procompetitive Goals Of The Federal Antitrust Laws

ASME concludes its argument in this Court (Br. 43) by urging that an exception from traditional principles of

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liability has received universal recognition. See, *e.g.*, 2 F. Mechem, *Agency* 1557 (2d ed. 1914) (collecting cases); 10 W. Fletcher, *Cyclopedia of the Law of Private Corporations*, *supra*, at 400-401. See also *Standard Surety & Casualty Co.* v. *Plantsville National Bank*, 158 F.2d 422, 424 (2d Cir. 1946); *Bowman* v. *Home Life Insurance Co.*, 243 F.2d 331, 334-335 (3d Cir. 1957); *Hester* v. *New Amsterdam Casualty Co.*, 412 F.2d 505, 509-510 (4th Cir. 1969); *United States* v. *Sanchez*, 521 F.2d 244, 246 (5th Cir. 1975); *Holloway* v. *Howerdd*, 536 F.2d 690, 695-696 (6th Cir. 1976); *National Acceptance Co. of America* v. *Coal Producers Association, Inc.*, 604 F.2d 540, 542-543 (7th Cir. 1979); *Employers' Liability Assurance Corp.* v. *L. J. Marcotte Insurance Agency*, 314 F.2d 470, 474-478 (8th Cir. 1963); *Dark* v. *United States*, 641 F.2d 805, 807-808 (9th Cir. 1981); *Gilmore* v. *Constitution Life Insurance Co.*, 502 F.2d 1344, 1348-1350 (10th Cir. 1974). *United Mine Workers* v. *Coronado Coal Co.*, *supra*, 259 U.S. at 395, refers to the same doctrine in the antitrust context. Although the Court found that the principal in that case was not liable, it was quick to emphasize that "[h]ere it is not a question of * * * holding out an appearance of authority on which some third person acts."

respondeat superior is necessitated by "the role that organizations, like ASME, actually play in the life of our nation." Thus, in view of the public service goals of such organizations, and their large size and multitudinous membership, liability should not be imposed for acts of agents that "are intended to benefit third parties and are undertaken without the knowledge or consent of the organization" (*ibid.*).

1. The practical consequences of bestowing the immunity that ASME seeks are sufficiently clear. Code-making organizations such as ASME, which are made up of members employed in the same industries that are subject to oversight by those organizations (Pet. App. A-16), are fraught with potential conflicts of interest. As the facts in this case show, officers of ASME were placed in a position to "legislate" in favor of their own companies and thereby preserve a monopoly position (J. App. 86).

Under ASME's proposed rule of agency law, intentional misconduct by such persons, who execute their anticompetitive schemes through the code-making body itself, could not be imputed to the code-making body if it withheld its "consent" and avoided "knowledge" of the misconduct. Thus, the threat of treble damages would engender a "see no evil" attitude on the part of the highest ranking officials in the code-making body. Precisely because of the existence of the treble-damage penalty—a penalty that Congress prescribed to deter anticompetitive practices—code-making organizations would have a strong incentive to *minimize* their supervision and investigation of potentially anticompetitive practices. To the extent that the organization succeeded in looking the other way, it would be free from liability and could rely with confidence on the defense that the acts of its agents were "undertaken without the knowledge or consent of the organization."

On the other hand, imposition of liability on code-making bodies such as ASME, whose agents impose unreasonable restraints on trade through the exercise of their official powers, will encourage the adoption of pro-

cedural safeguards to prevent such abuses. "Thus pressure is brought on those who [control] the entity to see to it that their agents abide by the law." *United States* v. *A & P Trucking Co.*, *supra*, 358 U.S. at 126. While punishment of individual agents alone is often "ineffective as a deterrent," punishment of the "business entity itself is likely to be both appropriate and effective" in assuring future compliance by all agents serving the entity. *United States* v. *Hilton Hotels Corp.*, *supra*, 467 F.2d at 1006.

Imposition of liability based on the traditional principles of agency law that we have summarized above would not, as ASME suggests, result in ruinous liability for code-making organizations. Indeed, ASME asserts (Br. 45 n.*) that it has administered its Codes for "nearly one hundred years without a single prior instance of abuse of its procedures like that present in this case." It also states (*ibid.*) that other code-making organizations, which have appeared as amici in this case, "have maintained similar exemplary records." While these unqualified assertions are open to question, the relative infrequency of episodes of misconduct demonstrates that imposition of liability in a case such as this would not have ruinous consequences. But imposition of liability would provide a continuing incentive for code-making bodies to adopt effective procedures to prevent a repetition of the misconduct disclosed by the record in this case.[21]

Thus, it is in the power of the code-making body itself to obtain substantial protection against antitrust claims. Associations such as ASME should effectively warn their agents about potential conflicts of interest inherent in

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[21] The threat of private litigation also would provide an incentive for code-making bodies to correct illegal restraints of trade inflicted by their agents when the facts are brought to their attention by an injured party. A prompt, unequivocal retraction, communicated effectively to the injured party's customers, would protect the injured party from continuing competitive harm and mitigate any claim for damages. By contrast, immunity from liability would significantly reduce the incentive to rectify such competitively harmful errors in a prompt and forthright manner.

their work and forbid them to "legislate" (see J. App. 86) invidiously against the products of disfavored firms. Perceived infractions of conflict of interest standards should be dealt with through appropriate disciplinary procedures.[22] These steps alone would further reduce the incidence of anticompetitive practices that ASME claims are "rare" occurrences.

In addition, despite the existence of a large volume of requests for Code interpretations, it is within the power of ASME to require review of interpretations that effectively prohibit the marketing of products with particular features. In the present case, while full committee review of Hardin's draft response may not have been necessary, a careful and objective check by another Subcommittee member familiar with the relevant provisions of the Code would have revealed the deliberate error introduced in the draft response by Hardin and James (see J. App. 124-126). Had ASME provided that additional check, it is probable that it would have avoided the present litigation and spared Hydrolevel the competitive injury that it suffered (see J. App. 109).[23]

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[22] In the present case, ASME's investigation of the activities of Mr. James resulted in a resolution—cleared by James himself as a "courtesy"—exonerating James and actually praising his behavior (H. Exh. V. 289-291; J. App. 103-104, 108-109). This occurred even though the conspirators "intentionally misinterpreted the Code" (Pet. App. A-12), and the underlying facts were brought to ASME's attention by Hydrolevel's complaints, extensive newspaper publicity, congressional hearings, and expressions of concern from ASME's top officials (J. App. 94-98, 99-100, 105-107, 108-109; see also *Hearings on Voluntary Industrial Standards Before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm.*, 94th Cong., 1st Sess. 196 (1975)).

[23] Contrary to ASME's assertion (Br. 36), the court of appeals' reference to the absence of procedural safeguards in this case does not reflect the adoption of a "negligence" standard. The jury was charged that it could not impose liability on the basis of negligence alone, and the court of appeals emphasized that liability rested on the intentional misconduct of ASME's agents (see pages 10-12, *supra*). Nonetheless, application of the doc-

2. As this Court frequently has stated, the very purpose of the treble damage remedy is to "deter violators." *Pfizer, Inc.* v. *India*, 434 U.S. 308, 314 (1978). "Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging * * * challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 344 (1979).

To assure effective deterrence of anticompetitive practices, Congress cast a broad net. "Every person" who engages in anticompetitive practices is exposed to liability. 15 U.S.C. 1, 2 and 7. Beyond this, Congress has provided in unequivocal terms that *both* corporations and their agents should feel the effect of the sanctions it has prescribed. Section 14 of the Clayton Act, 15 U.S.C. 24, provides that whenever a "corporation" has committed a violation of the antitrust laws through the actions of its agents, that violation "also" is deemed to be that of the individual "officers or agents" who have "done any of the acts constituting in whole or in part such violation * * *." Section 14 "was intended to be a * * * mandate to prosecutors to bring *all* responsible persons to justice." *United States* v. *Wise*, 370 U.S. 405, 414 (1962) (emphasis supplied).[24]

In view of Congress' manifest purpose to spread broadly the net of liability to enmesh all participants in

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trine of *respondeat superior* in cases of this kind encourages reasonable care on the part of principals to guard against anticompetitive abuses by their agents. Indeed, this is the central policy objective of the doctrine.

[24] While Section 14 of the Clayton Act, 15 U.S.C. 24, sought to assure punishment of individual agents along with their corporate principals, the proponents of the provision recognized that "the corporation itself" is liable because it "must act through individuals." 51 Cong. Rec. 9676 (1914) (remarks of Reps. Mann and Floyd). Thus, Section 14 was one of several provisions intended "to restore the strength of the statute and to make it more drastic and all-embracing." 51 Cong. Rec. 15820 (1914) (remarks of Sen. Reed).

anticompetitive schemes and achieve effective deterrence, it would be wholly inappropriate to dilute traditional principles of *respondeat superior* in antitrust litigation.[25] Indeed, this Court's decisions establish that, rather than raising barriers to liability above those existing at common law, courts should construe common law principles flexibly to assure effective deterrence. See *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 138 (1968) (the Court "has often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes"). *Perma Life Mufflers* added that "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." *Id.* at 139. If traditional common law principles must be construed flexibly to safeguard the effectiveness of treble-damage actions, then it follows *a fortiori* that barriers to relief in addition to those recognized at common law should not be erected in antitrust cases—which involve harm to the public interest in competition as well as private injury. And for this reason alone, ASME's request for immunity from the common law doctrine of *respondeat superior* should be rejected.

3. Finally, a still more fundamental reason for sustaining liability against a code-making body such as ASME, when its agents misuse their expressly-delegated authority and impose anticompetitive restraints, resides in what ASME refers to as "the role that organizations like ASME actually play in the life of our nation" (Br. 43). We do not for a moment question the substantial

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[25] In suggesting that imposition of vicarious antitrust liability is inappropriate because the treble damage remedy is partly punitive in nature (ASME Br. 32-33, 46), ASME appears to be asking this Court to create an implied exemption for it and similar entities. However, antitrust exemptions should not be implied absent a clear indication of legislative intent, and ASME does not purport to base its argument on legislative intent. As discussed below, Congress' deterrent purpose would be frustrated by creating the immunity from treble-damage liability that ASME seeks.

social contribution made by organizations such as ASME. But it cannot be disputed that ASME is a standard-prescribing body whose actions effectively govern competitive entry of new products into numerous lines of commerce. As the facts in this case demonstrate, a ruling by ASME that a product is dangerous or not in compliance with its Code can deprive a manufacturer of its customers. ASME itself acknowledges that its Code is implemented by governmental authority in 46 states and in all but one of the Canadian provinces (Br. 5). Thus, "the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce * * *." *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457, 465 (1941). See also *Associated Press* v. *United States*, *supra*, 326 U.S. at 14-19.

Application of the antitrust laws to "extra-governmental agenc[ies]," which otherwise would wield essentially legislative powers without check by public authority, is necessary to assure the survival of competitive conditions in the lines of commerce that are subject to their code-making activities. Indeed, exposure to actions such as the present private damage action will spur organizations such as ASME—which hold substantial power to affect adversely the public interest in competition—to adopt the very kinds of procedural safeguards which this Court has determined to be essential to avoid antitrust violations in similar cases. See *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 365 n.18 (1963) ("a private association's failure to afford procedural safeguards may result in the imposition of damage liability without inquiry into whether the association's action lacked substantive basis"); *Radiant Burners, Inc.* v. *Peoples Gas Light Co.*, *supra*, 364 U.S. at 658-660 (sustaining an antitrust complaint alleging that a code-making association barred a new product without applying "objective standards" and as a consequence of pressure from "competitors").[26]

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[26] *Silver* and *Radiant Burners* underscore the appropriateness of applying traditional principles of *respondeat superior* in a case

In short, consideration of "the role that organizations like ASME actually play in the life of our nation" (ASME Br. 43) strongly militates against the legal conclusion that ASME invites this Court to draw. The purpose of the federal antitrust laws to preserve competitive conditions through effective deterrence of unreasonable restraints of trade requires that organizations such as ASME, which delegate quasi-legislative powers to their agents, bear responsibility for unreasonable restraints of trade intentionally inflicted by those agents in the exercise of their official powers.[27]

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such as this. While ASME protests that imposition of liability is fundamentally unfair, it ignores the fact that it placed in the hands of its officers quasi-legislative power to proscribe the product of a disfavored competitor, and did so without providing procedures to assure accuracy and fairness. As the court of appeals observed, "no individual should be empowered to rule dispositively on the fitness of a competitor's product" (Pet. App. A-16). And, as *Silver* emphasized, liability is properly imposed on associations that permit "anticompetitive collective action * * * without according fair procedures." 373 U.S. at 364. See also D. Turner, *Consumer Protection By Private Joint Action*, Antitrust Law Symposium 36, 42-43 (1967).

[27] Of course, in contending that ASME is liable for antitrust violations resulting from the intentional anticompetitive practices of its officers exercising code-interpretation powers, we do not suggest that code-making activities are undesirable or should expose participants to liability simply because a particular competitor is hindered. For example, a good faith interpretation of a code provision reasonably designed to promote safety, which is surrounded with appropriate procedural safeguards, would not violate the "rule of reason" since such an interpretation would have the procompetitive effect of truthfully informing consumers. See *Silver* v. *New York Stock Exchange*, *supra*, 373 U.S. at 360 ("under the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out [its] mandate * * *"). Courts applying the rule of reason to associations promulgating rules or standards have approved association decisions that comply with basic requirements of procedural and substantive fairness. See, *e.g.*, *Hatley* v. *American Quarter Horse Association*, 552 F.2d 646, 651-654 (5th Cir. 1977); *Eliason Corp.* v. *National Sanitation Foundation*, 614 F.2d 126, 128-131 (6th Cir. 1980); see also Note, *Trade Association*

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

STEPHEN M. SHAPIRO
Deputy Solicitor General

BARRY GROSSMAN
MARK C. DEL BIANCO
Attorneys

ERNEST J. ISENSTADT
Acting General Counsel
Federal Trade Commission

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Exclusionary Practices: An Affirmative Role for the Rule of Reason, 66 Colum. L. Rev. 1486, 1508-1510 (1966) ("the added cost of setting up such a fair procedure is a small price to pay for the privilege of self-regulation"); L. Sullivan, *Antitrust* 247-253 (1977).

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